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APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 324

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants,*

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
HOWARD L. LOVE; J. RALPH HUTCHINSON, Members of
the Missouri State Tax Commission, and J. R. TOWSON,
Secretary of the Missouri State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

Notice of Appeal Filed—May 9, 1967

Probable Jurisdiction Noted—October 9, 1967

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APPENDIX

Docket Entries

1966	Banc or Div.	Book	Page
Jan. 14—Notice of appeal filed.	Bc	23	495
Mar. 17—Transcript of record filed and record of hearing before State Tax Commission filed, and exhibits deposited.	Bc	23	569
June 6—Assigned to Division One.	Bc	24	46
Aug. 8—Appellants' brief, showing service, filed.	I	17	354
Sept. 12—Respondent's brief, showing service, filed.	I	17	374
Sept. 17—Appellants' reply brief, showing service, filed.	I	17	387
Sept. 23—Argued and submitted.	I	17	393
Dec. 30—AFFIRMED. Henley and Hyde, J.J., and Streckman, Alt. J., concur., Holman, P.J. not sitting. <i>Opinion by Higgins, C.:</i>	I	17	456

Banc
or
Div. Book Page

1967

- Jan. 13—Motion of appellants for rehearing or, in the alternative, for transfer to Court en Banc, with suggestions in support thereof, filed with service shown. I 17 471
- Jan. 26—Respondents' suggestions in opposition to appellants' motion for rehearing or in the alternative for transfer to Court en Banc, filed with service shown. I 17 487
- Feb. 13—Motion of appellants for rehearing or, in the alternative, for transfer to Court en Banc overruled. I 17 494
- Feb. 21—Motion of appellants to stay the mandate filed and sustained. I 17 496
- May 9—Appellants' Notice of Appeal to the Supreme Court of the United States filed with service shown. I 17 565
- Oct. 17—Order noting probable jurisdiction filed by the Supreme Court of the United States. I 18 20

Transcript of Proceedings

STATE TAX COMMISSION OF MISSOURI

In the matter of the 1965 ad valorem tax assessment
of the NORFOLK AND WESTERN RAILWAY COMPANY.

June 15 and June 23, 1965
Commission's Offices
Room 501, Jefferson Building
Jefferson City, Missouri

BEFORE:

HUNTER PHILLIPS, Chairman, HOWARD L. LOVE,
J. RALPH HUTCHINSON, Members.

APPEARANCES:

ARNOLD BRANNOCK, Attorney, State Tax Commission,
Jefferson City, Missouri,

For the State Tax Commission.

SHOOK, HARDY, OTTMAN, MITCHELL and BACON,
Attorneys at Law, 915 Grand Avenue, Kansas
City, Missouri, by Charles L. Bacon and Frederick
Beihl; and

JOHN F. McCARTNEY, Tax Attorney, Norfolk and
Western, St. Louis, Missouri,

*For the Norfolk and Western
Railway Company.*

[Tr. 7]

BE IT REMEMBERED, that at a continued hearing of the State Tax Commission, held on June 23, 1965, at the place set forth in the title page hereof, the Commission and Counsel appearing as before, and in addition John H. Denman, Assistant Attorney General, Jefferson City, Missouri, appeared as an observer, and the following proceedings were had:

[Tr. 7] • • • •

MR. BACON:

[Tr. 8] • • • •

At this time, we have submitted to the Chairman and to Counsel for the Commission a proposed Stipulation for consideration to see if this could be executed and filed as a part of the record.

MR. BRANNOCK: The Commission has considered the Stipulation and is agreeable to the contents thereof, and has authorized me to execute it.

[Tr. 8] • • • •

MR. BACON: I think at this time we will file the Stipulation.

MR. BRANNOCK: Let it become a part of the record.

MR. BACON: So it becomes a part of the record proper. So your record will show it is filed and becomes a part of the record by agreement of the parties?

MR. BRANNOCK: That is agreeable.

(Said Stipulation is as follows:)

STIPULATION

"It is stipulated and agreed that this proceeding is a contested case within the meaning of the Administrative Procedure Act of Missouri and, having been properly commenced, the parties hereto waive all requirements as to notice and time and place of this hearing; that [Tr. 9] the Norfolk and Western Railway Company is incorporated under the laws of the Commonwealth of Virginia with

its principal office and place of business in Roanoke, Virginia; that the Wabash Railroad Company is incorporated under the laws of Ohio with its principal offices and places of business in Wilmington, Delaware, and Philadelphia, Pennsylvania; that Norfolk and Western Railway Company owns no track or roadbed within Missouri but leases all of the track and roadbed owned by Wabash Railroad Company in Missouri, and elsewhere, together with all the rolling stock owned by Wabash Railroad Company, all pursuant to Lease dated March 1, 1961, as amended by Amendment dated as of October 1, 1964, effective as of October 16, 1964.

"It is stipulated that the State Tax Commission of Missouri, in arriving at the assessed value of the rolling stock in this case for the year 1965, used the depreciated value of all rolling stock and movable property owned or leased by Norfolk and Western as of January 1, 1965, wherever situated, in the amount of \$513,309,877; that in this case as in all other railroad assessments, the depreciated value was determined by taking the original cost of the equipment by year of acquisition and allowing 5% depreciation per year, but with a maximum allowable [Tr. 10] depreciation of 75% of original cost; that in this case as in the case of all railroad assessments for the year 1965, a factor of 47% was applied by the State Tax Commission resulting in this case in the figure of \$241,255,643; that the track formula was then applied; 8.2824% of all of the main and branch line tracks everywhere which were leased, owned, or controlled by Norfolk and Western was within Missouri, and this percentage of the above value of the depreciated rolling stock was determined to be \$19,981,757 and was by the Commission stated to be the value of the rolling stock properly taxable in Missouri; that from the total value of the fixed property assessed in Missouri at \$12,177,597, which property was owned by the Wabash Railroad Company and leased to Norfolk and Western, and the above assessed

value of the rolling stock, the sum of \$860,415 was deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts; and that as the result of the above method of assessment and computation, a total assessed valuation was made of \$31,298,939.

/s/ W. ARNOLD BRANNOCK

Attorney for State Tax Commission

/s/ CHARLES L. BACON

Attorney for Norfolk and Western

Railway Company and Wabash Railroad Company

[Tr. 11]

Dated: June 23, 1965"

FILED: June 23, 1965 M.S.B.

[Tr. 23]

MR. BACON: Mr. Chairman and Gentlemen, if I might just for a minute or two tell you what we want to bring before [Tr. 24] you today for your consideration.

Of course, our basic position in general terms is set forth in the writing which we have heretofore filed, so I see no reason to report or go again into that which we have filed and which has been presented to the Commission.

Of course, basic to the problem is the fact that because a lease was signed on October 16, the Commission instead of dealing with a \$82 million depreciated value—I am using round numbers—of Wabash, as of January 1, 1965, you are dealing with \$513 million depreciated value as of that date, under the interpretation that the Commission has given to the socalled leasing statute of the taxing statute, and applying the track formula as it is set forth in the statute.

We will have evidence to show you that there has been no appreciable change whatsoever in the Wabash operations in Missouri, that the flow of traffic and the volume of traffic over the road has not increased, that the per-

centage or the value of rolling stock in Missouri, the lease has not affected that in any appreciable manner whatsoever.

Our position is that when you apply the track formula without adjusting further, that under our peculiar and unusual and unique facts, you come up with an assessed value which is so far away and above the depreciated value of that portion of rolling stock which is in Missouri, that you come up with a result which, in effect, amounts to a violation of the due [Tr. 25] process laws, a violation of the commerce clause, both of the United States Supreme Court, and the due process of the federal and state Constitutions.

It has the effect, when you apply that track formula, of reaching out and bringing into Missouri property and subjecting it to tax which has no proper tax situs in Missouri, because of the interpretation of the lease. So fundamental to our approach to this thing is this tremendously shocking difference. The evidence will show that on your worksheet the figure of \$19,981,000 plus was assigned as the depreciated value of the rolling stock after the factor was applied. Our evidence will be that this is far and above the depreciated value of the Wabash property. It will be far and above the depreciated value of the actual units which were in Missouri on January 1, 1965.

I would like for the Commission to know that we have gone to every length to come before you here today with some results of studies which will show this figure.

Now, it is our position that when you apply the track formula without adjusting it down to where you bring the figure more to where it has at least a reasonable relationship, to the depreciated value of the actual property in Missouri, that is when you run into your constitutional questions of due process of the commerce laws, and where you, in effect, are attempting to establish a tax situs in Missouri for property [Tr. 26] that never gets to Missouri.

We further take the position that the word lease or leased in the taxing statute of railroads was never intended to cover or apply to a situation like ours, but that it was put in there to plug the gaps for the railroads, I mean on cars that they might have that the State wasn't getting any value on; that it was never intended legislatively to apply to a situation like this, where the great bulk, because of the unique operations of the N & W and the Nickel Plate, operating in that coal region, shuttling back and forth from the mountains to Norfolk, that it never was intended to apply to the kind of a situation we have here, where the traffic pattern in the Wabash Railroad—we will have evidence for you as to the exact change, if any, that has taken place. We will have evidence for you that after the lease, well even before the lease, it was never contemplated that there would be any change in the flow of traffic over the Wabash lines in Missouri, or that you would be bringing these 45,000 hopper cars that are used in the coal fields here into Missouri in great bulk.

We take the position, therefore, that when you apply that lease statute to our factual situation, that that, in turn, brings you, if you are going to apply the track formula alone, to the result which we have here and which we say is clearly not only unfair and inequitable, but that it is a violation of the Constitutions of the United States and of the State of [Tr. 27] Missouri.

We want to show you the operations of these roads. We want to show you how they are, the different business that they handle. We want to show you what has happened in Missouri before and after this lease. We want to show you what the value, or the tax assessed value would have been on January 1 as of the old Wabash road operating practically like it did before, certainly as far as the flow of traffic and volume is concerned. We want to show you what that would have been for comparison with what your track formula results in.

Now, I don't want to go into great detail here, but, basically, that is the evidence we want to bring to you today. And when you see what happens when you apply this track formula to our facts and with no change in the operation of the road in Missouri, as far as your flow and your volume, and so on, is concerned, any appreciable change whatsoever, I can't help but believe that the Commission will feel that under these facts that the result is a violation of constitutional rights. I think that the Commission will feel that under these facts that they should look for further adjustments which will bring the assessed value down from that which is arrived at applying the track formula to some reasonable relationship with the value of the rolling stock that was actually in Missouri on tax date and during the year.

Now, generally speaking, that is what we want to give [Tr. 28] to you. We have worked extremely hard to try to simplify these studies that we have made so they can be brought in and put before you for your consideration and for your evaluation as to the overall result.

I think there is nothing more for me to say in a preliminary way.

MR. BRANNOCK: I might state the position of the Commission. We are attempting to administer Chapter 151 of the Revised Statutes of Missouri, which provides that we shall assess all railroad property as of the first of January of each year, and which also sets forth the formula of trackage, as stated by Mr. Bacon. His statement of the law, I believe, is correct. He is complaining that the application is costing his client too much money. However, the law is as passed by the Legislature and all this Commission can do is to administer the law as it is written.

The fact that these other exhibits may be offered, and the fact that it results in increased taxation to a company that is just entering Missouri and has never been in Missouri before, we believe is immaterial, and that

the Commission will object to any such offers made on the fact that it allegedly puts a burden on this new company coming into Missouri for the first time.

[Tr. 33]

E. W. Nixon,

being sworn, testified as follows:

DIRECT EXAMINATION

by Mr. Bacon:

Q. Would you please state your full name for the record?

A. E. W. Nixon.

Q. Where do you live, Mr. Nixon?

A. At Roanoke, Virginia.

Q. By whom are you employed?

A. By the Norfolk and Western Railway Company.

Q. How long have you been employed by the Norfolk and Western Railway?

A. Since January 1, 1965.

Q. What is your present title and what are your present duties with the Norfolk and Western?

[Tr. 34] A. I am the Assistant General Manager of the Transportation of the Norfolk and Western, and in that capacity I have responsibility for the coordination of schedules, services, and train operations for the acquisition of equipment, freight cars, locomotives, and for the distribution and control of that equipment over the entire new operation of the Norfolk and Western.

Q. Before you were with Norfolk and Western, by whom were you employed?

A. By the Wabash Railroad Company.

Q. When did you go with the Wabash?

A. In 1935.

[Tr. 43]

Q. (by Mr. Bacon) Now, Mr. Nixon, because of what you are going to testify to about the operations of the

components — when I say "components" I mean the Wabash and the Nickel Plate and the old N & W—I think it is important for the Commission to know what the reason was for N & W, which had all of the coal moving down from the mountainous regions to Norfolk and back up to the Lakes and to the eastern industrial areas—

MR. BRANNOCK: (Interposing) That is objected to as wholly immaterial.

MR. BACON: Excuse me. Shall I wait for the ruling?

CHAIRMAN PHILLIPS: We will sustain that objection. I think it is wholly irrelevant, unless you tie it in to something.

MR. BACON: I hadn't asked my question yet. [Tr. 44] I was giving some background. I can ask him specific questions and let objections be made on each one.

The question I was going to ask was—the reason why the N & W wanted to lease the Wabash Railroad.

MR. BRANNOCK: That would be wholly immaterial. The material fact here and the ultimate fact is that they did lease it and that they had it under such lease on January 1, 1965. Why they did it is not material.

MR. BACON: May we proceed?

MR. BRANNOCK: On that, that is so immaterial that I would stand on that, as far as I am concerned.

How does the Commission feel about it?

CHAIRMAN PHILLIPS: It is sustained.

MR. BACON: All right. May I make an offer of proof then?

CHAIRMAN PHILLIPS: You may.

MR. BRANNOCK: You may make an offer of proof.

MR. BACON: It is my purpose to ask this witness, Mr. Nixon, the question as to the reason back of the N & W wanting to lease the Wabash Railroad, why they leased the Wabash lines and the equipment, in view of the fact that they were a big coal-hauling road in the East. Objection has been made. This becomes very important to the overall picture which we want to give [Tr. 45] to the Commission

of the fact that the Wabash Railroad had a different type of merchandise hauling from the N & W, that the N & W was a big coal-hauling road in the East, operating to the Tidewater and to the Lake area and to the eastern industrial area, primarily, and we are leading to the point that there was no contemplation or intent of tying the Wabash Railroad's lines into a lengthening of the N & W lines for the purpose of transcontinental hauls, that it was wanted because it was a profitable operation, because at one place there was a paralleling of lines between the old Nickel Plate and the Wabash, so that there could be a savings there insofar as doing away with duplication of effort and the roads there were highly competitive, and that could be done away with.

We want to show this further reason, we want to get completely into the record the different operational situations between the Wabash Railroad and the rest of the roads that make up the N & W operational procedure.

MR. BRANNOCK: Mr. Bacon, it seems to me that you are unnecessarily cluttering this record to put in such wholly immaterial things, even as an offer of proof, and we would appreciate it if you would make your offers of proof as concise as possible. Why you did these things has nothing to do with the taxes as [Tr. 46] of January 1, 1965.

MR. BACON: Mr. Brannock, the point is that the—

MR. BRANNOCK: (Interposing) I am sorry I brought on another statement.

MR. BACON: The point is that is most important for anybody considering the basis on which we are here complaining, to have all of this material in front of them.

CHAIRMAN PHILLIPS: Proceed, Mr. Bacon.

MR. BACON: Where do we stand?

CHAIRMAN PHILLIPS: We are to here to hear the case of Norfolk and Western.

MR. BACON: I meant on the record.

MR. BRANNOCK: I think it is time to ask your next question—being as you asked me.

MR. BACON: I asked the reporter where we stand on the record.

MR. BRANNOCK: Let it be understood that I object to any testimony with regard to anything other than the fact that the lease became effective October 16, 1964, and I will not make specific objections, but with the understanding that my objection follows to any such offers.

MR. BACON: All right, sir.

CHAIRMAN PHILLIPS: We will let it in the record for what it is worth.

MR. BACON: I would add to my offer of proof, [Tr. 47] that if Mr. Nixon had been permitted to testify he would have testified to the facts—

CHAIRMAN PHILLIPS: Let's let Mr. Nixon testify. We said we would let him testify.

MR. BACON: Oh, we are going to go back and start over?

MR. BRANNOCK: No.

CHAIRMAN PHILLIPS: Let him testify for what it is worth. Go ahead with your witness. Let him testify.

MR. BACON: You want me to back up before we made the offer of proof, or to take it after that?

MR. BRANNOCK: All I was trying to do was to keep from making continuous objections.

MR. BACON: From now on?

MR. BRANNOCK: That it is understood that I object to all of this line of testimony.

CHAIRMAN PHILLIPS: Proceed to interrogate your witness.

Q. (by Mr. Bacon) As you worked to put together this leasing arrangement, did the committee contemplate any operational change as far as the Wabash Railroad was concerned?

A. No, sir.

Q. Was it contemplated by this committee that the volume of business handled in Missouri would be increased as a result of this lease to Norfolk and Western?

[Tr. 48] A. No, sir.

Q. Insofar as the coal hauls of the N & W were concerned, was it contemplated that there would be any change in that operation in the Appalachian and Pocahontas areas?

A. No, sir.

Q. By the way, let's get straight what we are talking about when we are talking about regions of the railroad. Operationalwise, you have what you call the Atlantic Region, is that correct?

A. Right.

Q. What does that encompass generally, I don't mean in detail, just the area?

A. That encompasses the area east of Bluefield, Virginia, and Bluefield, Virginia is in the heart of the coal fields at the top of the Allegheny Mountains.

Q. Is any part of that area encompassed in Missouri?

A. No, sir.

Q. What do you call the Pocahontas Area?

A. The Pocahontas Area is that part of the system that runs from Bluefield, Virginia to Cincinnati, Ohio, and to Sandusky, Ohio.

Q. Is any part of that region encompassed in Missouri?

A. No, sir.

Q. Where is the Lake Region?

A. The Lake Region is that part of the line between [Tr. 49] Frankfort, Indiana, Fort Wayne, Indiana, Toledo, Ohio, Buffalo, New York, and Collingsville, Pennsylvania.

Q. What do you call the Western Region?

A. The Western Region is from Detroit, Michigan through Fort Wayne, down to Decatur, Illinois, and from Montpelier, Ohio across to Chicago, and from Chicago down to Decatur, and from Frankfort to St. Louis, and from Decatur west to Hannibal and southwest to St. Louis, and all of the tracks in Missouri and Iowa.

Q. In other words, Missouri is a portion of the socalled Western Region that you now use for operational purposes?

A. Yes, sir.

Q. All right, sir. Now, operationwise and businesswise, Mr. Nixon, I am talking now about after October 16, what change, if any, has taken place as far as Missouri is concerned and the old Wabash lines?

A. Well, the only change in the operations has been in the movement of a few cars that formerly were, prior to the lease of the Wabash, routed both over the Nickel Plate and the Wabash with connection at East St. Louis, Illinois. And on those cars where the cars were formerly routed over the Nickel Plate and Wabash, now we would handle those cars through Hannibal, Missouri instead of through St. Louis, for purposes of expediting the movement of the cars. This is a very, very small amount of traffic.

[Tr. 50] Q. To boil it down, if I understand it correctly, the only change that has taken place is that cars moving east on the Wabash lines from Kansas City and going on up northeast now go through Hannibal rather than St. Louis?

A. That's correct.

[Tr. 56] Q. All right, sir. Now, Mr. Nixon, I want you as succinctly as you can to describe for the Commission the operations of the N & W as they existed before the lease and as they exist after the lease.

A. The Norfolk and Western Railway has a very unique [Tr. 57] operation insofar as railroads go. The character of their traffic was unusual in that such a great percentage of it was in coal traffic moving from the coal mines of Virginia, West Virginia and Kentucky to the seaboard, which is called Tidewater down there, and also to Columbus and Cincinnati, Ohio, on the west. This railroad loads more coal, has more coal loaded on its own line than any other railroad in the United States.

Furthermore, on October 16, 1964, coal traffic consisted of 70 percent of their total revenues. This was

unique and no other railroad in the United States had that kind of experience. Other railroads served these same coal fields, notably the C & O Railroad, but they have tracks that go into Chicago and go into Detroit, and into Buffalo and Toledo, and therefore they have other types of traffic to supplement their coal traffic.

A great proportion of this coal traffic, this big volume of coal traffic on the Norfolk and Western Railroad moves from the coal mines in the Allegheny Mountain area, which is around Bluefield, Virginia, down to Tidewater, and is loaded on boats there for trans-shipping either to public utilities or to industries along the coast, or to foreign countries.

Q. Did the demand for equipment in the area which you have described of Virginia and the Tidewater area, and the eastern centers, make it necessary and does it now make it [Tr. 58] necessary for you to exercise any particular degree of control over the location and use of your hopper cars?

A. I don't think there is anything more important on the operation of the Norfolk and Western than to control the utilization of these coal cars, because they load as high as—well, they have loaded as high as 5,500 cars, average around 4,800 cars of coal a day in these coal mines served on the old Norfolk and Western, and if there is no coal there, no coal cars there, the coal companies usually have mines on other railroads, and if they don't have the equipment to load there, they will load it on some other railroad because in many cases the coal is loaded very shortly after the time it is loaded at the mine.

So for this reason the distribution and the control of coal cars is one of the most important phases of the old N & W's operation.

Q. Just for the record, would you explain to us what you mean when you use the term hopper car?

A. Well, hopper car is an open top coal car with the dump bottom in it, which is the way that, by far, the greater majority of coal is handled, and in our particular railroad I would say it is the way that about 95 or 97 percent of the coal is handled, in these hopper cars.

Q. In order to assist you in the control of your hopper cars, did the Association of American Railroads issue any [Tr. 59] particular orders?

A. Yes, sir.

Q. I hand you that which has been marked Taxpayer's Exhibit 6, and I will ask you to state what that is.

A. This is the Association of American Railroad's Special Car Order No. C-411 - Revised.

Q. I notice that this particular exhibit is dated June 8—or 3, I can't tell which it is—of 1965; was this order that you are referring to dated as of June, 1965?

A. No, this is a revision of the original order. The original order has been in effect approximately forty years.

Q. Mr. Nixon, before we go any further in discussing this exhibit, this is a copy of the order issued by the Association of American Railroads?

A. Yes, sir.

Q. And that is issued by that Association under the authority of the ICC?

A. That is correct.

MR. BACON: We now offer in evidence, before any further explanation, Exhibit 6.

MR. BRANNOCK: It is understood that our objection runs to all of this?

MR. BACON: Yes, sir.

Q. (by Mr. Bacon) Now, will you tell us, sir, what this order is and how it affects N & W?

[Tr. 60] A. This order covers the hopper cars of the C&O, the L&N, and the Norfolk and Western's ownerships developing empty in states east of the Mississippi and west of the six New England states.

The effect of this order is that all railroads who have hopper cars of these three railroads' ownerships that develop empty on their lines must return them immediately to the owning line. They cannot use them for loading on their own railroads.

Q. Without this order being effective, what use is possible by other roads of these hopper cars?

A. Other car service rules would apply which would permit the other railroads to load these as long as they could load them in the general direction of home. But this order makes it necessary to send the cars immediately home without being under load, which expedites the return of them to the owning line tremendously.

Q. And this applies to the N & W and two other railroads only?

A. That's correct.

Q. Mr. Nixon, I hand you an exhibit marked No. 7, and will ask you to take a look at that and tell us what it is?

A. This is a coal car distribution and rating bulletin issued by the Norfolk and Western Railway Company, and it lists all the mines on the Norfolk and Western Railway Company, and [Tr. 61] the rated loading capacity of those mines.

Q. That indicates the location and capacity of the mines in the various regions in which N & W now operates; is that correct?

A. Yes, sir; that's right.

Q. Not to go into the whole detail, how many mines are in Missouri?

A. Two mines are in Missouri.

Q. How many mines are shown on that, that you furnish your hopper cars for, outside of Missouri?

A. Well, in the Pocahontas Region, which covers the Atlantic and Pocahontas Region, there is 191; and in the Lake Region there are 23.

Q. None of the Lake Region encompasses Missouri?

A. No, sir.

Q. There are only two mines in Missouri?

A. Yes, sir.

Q. Now, Mr. Nixon, will you tell the Commission about the type of equipment that N & W needs to handle this terrific amount of coal movement?

A. In the first place, we have touched on briefly before, we need a terrific amount of hopper coal cars, and, of course, the next thing we need is location in order to handle this terrific volume of coal movement. The Norfolk and Western was a steam railroad probably longer than any other railroad in [Tr. 62] the United States before converting to diesel. As a result of that, they had the benefit of the other railroads' experience in diesel operation, to a great extent, so when they purchased power they were able to buy diesel power which was tailor-made more for their type of operation than they would have been if they had got in on the early stages when there wasn't as many diesels to choose from.

Q. When you say "power," you mean locomotives?

A. Yes, sir. So the power or the locomotives on the Norfolk and Western are purchased with the thought in mind of pulling heavy coal trains which will average up to two hundred cars per train and we operate many trains with two hundred and fifty carloads of coal.

MR. BRANNOCK: Mr. Bacon, this is so wholly irrelevant, I just can't see why it should go in even as an offer of proof.

MR. BACON: I think there is no doubt but what we are showing the difference in even the basic type of construction. These locomotives can't even be used out here, they can't be used in multiple units with Wabash because of the difference in construction, because they are needed for a different purpose completely.

CHAIRMAN PHILLIPS: I think it is irrelevant, but let him proceed for what it is worth.

[Tr. 63] MR. BACON: All right.

Q. (by Mr. Bacon) Tell us some of the specific manners in which, for example, the locomotives used by N & W in your mountainous coal haul differs from the locomotives used on the Wabash system for a different type of purpose.

A. Well, the locomotives on the N & W are equipped with dynamic brakes and the locomotives on the Wabash and the Nickel Plate are not equipped with dynamic brakes. Their brakes enable them to handle big trains down long grades much better than you can with the conventional braking system.

The power on the Norfolk and Western was purchased with the idea in mind of getting high horsepower, but also a high traction effort for long, slow pulls up these grades with heavy trains. On the Wabash and the Nickel Plate, our purpose in getting high horsepower is for a high speed manifest train rather than for long, hard, slow pulls.

MR. BRANNOCK: They would run on the Wabash tracks, wouldn't they?

WITNESS NIXON: They would run on the Wabash tracks, but they wouldn't multiple with the Wabash power.

MR. BRANNOCK: I am just asking you if they would run on the Wabash tracks.

WITNESS NIXON: Yes.

COMMISSIONER HUTCHISON: Are you saying, Mr. [Tr. 64] Nixon, the equipment is not interchangeable?

WITNESS NIXON: No, sir. You cannot take a Norfolk and Western—all your locomotives nowadays are put together in multiple units, three, four, five units.

COMMISSIONER HUTCHISON: The point you are making, you leased the Wabash because it was a competitive line to the Nickel Plate?

WITNESS NIXON: Yes, sir; that's right.

MR. BRANNOCK: On some occasions, they just run one locomotive, one unit, don't they?

WITNESS NIXON: On local trains; yes, sir.

CHAIRMAN PHILLIPS: Will these trains operate on the Nickel Plate line, these cars, these diesels?

WITNESS NIXON: They will operate on the line, but they won't multiple with the Nickel Plate engine.

MR. BACON: Since the Commission has gotten into this question—I was going to get to it later—by the way, let me formally offer, if I haven't, Exhibit 7, I believe it is.

MR. BRANNOCK: I renew the objection to it.

[Tr. 66] * . * . *

MR. BACON: Now, we have offered this in evidence, that is Exhibit 10 I am referring to. I don't mean to go through all these figures, but what is the basic factor to be drawn from this particular exhibit?

WITNESS NIXON: Well, this exhibit shows very clearly that a Norfolk and Western diesel locomotive will not multiple with either the Nickel Plate or the Wabash.

Q. (by Mr. Bacon) I see the word "M.U." used in that, what does that mean?

A. Multiple unit.

Q. In other words, it won't multiple, you mean you can't use it in multiple units?

A. Correct.

Q. This was distributed over the system to show the locomotives that could not be used in multiple units with others?

A. That's right.

[Tr. 67] **Q. What does it show with regard to N & W locomotives?**

A. That they will.

Q. And Wabash?

A. Well, the N & W locomotives and Wabash locomotives will not multiple unit together.

MR. BRANNOCK: Will they with the Nickel Plate?

WITNESS NIXON: No, sir.

MR. BRANNOCK: But the multiple units of the N & W could come out here and run over the Wabash lines or over the Nickel Plate lines, could they not?

WITNESS NIXON: As long as you kept them separate from the other engine; yes, sir.

Q. (by Mr. Bacon) I have asked you concerning a general description of the N & W operations and you have given it to us. The Nickel Plate was bought and merged with N & W as of October 16; will you give us a brief statement concerning the operations of what we will call the old Nickel Plate?

A. The old Nickel Plate is what we term a bridge line, meaning that it is an intermediate carrier between the west and east. The Nickel Plate operates from East St. Louis, Illinois, and Peoria, Illinois, and Chicago, on the west, to Buffalo on the east. The character of its traffic is primarily merchandise, general merchandise traffic. Boxcar traffic is the principal character of its traffic.

Q. Does it have coal operations as a part of its business?

[Tr. 68] A. Yes, it does have a coal operation that is in the Eastern Ohio area. And this coal from that area is taken to the Pittsburgh area, or it is taken to the Great Lakes area, or to the industrial centers of Chicago, Toledo and Buffalo.

Q. Mr. Nixon, I am directing your attention to a period after the lease rather than before; has there been any change in the operation of the coal-hauling procedure or traffic business for N & W and Nickel Plate?

A. No, sir; there has not.

Q. Do you assign locomotives by regions?

A. Yes, sir; we do.

[Tr. 69]

Q. All right, sir, thank you. Now, Mr. Nixon, I hand you Exhibit 9, and I will ask you generally to state what it is.

A. This is a statement of the locomotives owned by the Norfolk and Western, exclusive of the New York, Chicago & St. Louis (Nickel Plate), as of January 1, 1965.

[Tr. 71]

Q. Now, Mr. Nixon, I want you to tell the Commission whether or not any of the locomotives described and figured in Exhibit 9 were in Missouri on January 1, 1965, or at any time during the year 1964?

A. No, sir; they were not.

Q. Do you, as an officer of the Company, have any present plans whereby your operations would change to where these locomotives would come into Missouri?

A. No; sir; we do not.

Q. Why?

A. Because the assignment of these units to the Norfolk and Western property down there is such that they continue to be required down there and there would be no particular advantage in transferring them up—and this, of course, is emphasized by the fact that we can't M.U. these units with the Wabash units.

[Tr. 72]

Q. I will now hand you Exhibit No. 11. Will you tell us what that is?

A. This is a list of locomotives formerly owned by New York, Chicago and St. Louis (Nickel Plate) and now owned by Norfolk and Western, as of January 1, 1965.

[Tr. 73]

Q. Now, Mr. Nixon, will you tell us whether or not any of the locomotives represented in Exhibit 11 were in Missouri on January 1, 1965, or in Missouri at any time during 1964?

A. They were not.

Q. Why do you give that answer?

A. Because we had none of those engines in the State of Missouri on those dates.

Q. Now, shall we turn our attention to the hopper cars? I will hand you at this time Exhibit No. 12. Will you tell us what this is?

A. This is a statement that I had prepared, showing the hopper cars owned by the Norfolk and Western, as

of January 1, 1965, excluding those formerly owned by the New York, Chicago & St. Louis (Nickel Plate) Railroad.

Q. Was this chart prepared under your supervision and [Tr. 74] at your direction?

A. It was.

Q. And are the figures shown on this exhibit correct and accurate?

A. Yes, sir.

MR. BACON: We now offer in evidence Exhibit No. 12.

MR. BRANNOCK: Same objection.

Q. (by Mr. Bacon) Now, sir, will you explain this exhibit to us?

A. This exhibit shows the total number of coal hopper cars owned by the Norfolk and Western, and the year of acquisition, with the original cost determined from our valuation department, and a depreciated value depreciated on the Missouri State Tax Commission depreciation rate of 5 percent per year, for a maximum of 75 percent depreciation.

Q. Now, on several of these exhibits, Mr. Nixon, I notice that you group together under year of acquisition and original cost, "1950 and Prior," why is that handled that way?

A. Because anything prior to that time would be prior to the 15-year period, fully depreciated.

Q. In other words, your depreciation has been fully taken so that is why it was put in the exhibits that way. Will you give us, sir, the total number of these coal hopper cars, their original cost and depreciated value?

[Tr. 75] A. The total number of cars is 58,655, the original cost is \$339,727,351.04, the depreciated value is \$212,562,046.58.

Q. I hand you now, Mr. Nixon, Exhibit 13, and I will ask you to state what that is.

MR. BRANNOCK: The same objection to No. 12.

MR. BACON: Yes, sir. I assume it is considered in evidence, subject to the objection?

MR. BRANNOCK: All right.

WITNESS NIXON: This is a statement of the location of coal or, in other words, open hopper cars, which shows the Wabash hopper cars on Wabash lines, the Nickel Plate hopper cars on Nickel Plate lines, the Norfolk and Western hopper cars on lines of Norfolk and Western other than Wabash and Nickel Plate, as of the first of January, 1963, and the first of each subsequent month up to and including January 1, 1965.

Q. (by Mr. Bacon) Was this exhibit made up under your direction and supervision?

A. Yes, sir.

Q. And are the results shown here correct and accurate?

A. Yes, Sir.

MR. BACON: We offer in evidence Exhibit 13.

MR. BRANNOCK: It is understood my objection follows to all these exhibits and testimony regarding them?

[Tr. 76] MR. BACON: Yes, sir.

Q. (by Mr. Bacon) Now, Mr. Nixon, will you tell us how you got the information for this exhibit and put it together?

A. This information was obtained from the car accounting records from which we can determine the actual location of the cars on any day that we use, and we picked them for the cars, the Wabash cars on Wabash lines, Nickel Plate cars on Nickel Plate lines, Norfolk and Western on Norfolk and Western lines—the ownerships on each of those lines is shown for those particular dates.

Q. Now, I noticed asterisks following the months of November 1, 1964, December 1, 1964, and January 1, 1965; will you explain why the asterisks are there and what they mean?

A. The asterisks mean that in those figures the hopper cars on the Wabash line included the Nickel Plate hopper cars and the Norfolk and Western hopper cars. And the hopper cars on the Nickel Plate line includes the Wabash cars and the Norfolk and Western. And on the Norfolk and Western lines, for those three figures, it includes the Nickel Plate hopper cars and the Wabash hopper cars.

Q. Now I want to be sure that this exhibit is completely understood. Am I correct, let's take where it says "Wabash Hopper Cars on Wabash Lines," let's take that column—now, that doesn't mean Wabash lines in Missouri only, does it?

A. No, sir; that is the entire Wabash system.

[Tr. 78] • • • •

Q. I hand you Exhibit 14, Mr. Nixon, and I will ask you to state what it is.

A. This statement shows the Norfolk and Western hopper cars in Missouri, on-line and off-line, on December 1, 1964, and January 1, 1965, excluding Wabash and former New York, Chicago & St. Louis (Nickel Plate).

Q. Was this exhibit made at your direction and under your supervision?

A. Yes, sir.

Q. Was it made from the records of your company, kept in the ordinary business operations?

A. Yes, sir.

Q. Are they true and correct, the results shown here?

A. Yes, sir.

MR. BACON: We now offer in evidence Exhibit No. 14.

MR. BRANNOCK: The same objection.

Q. (by Mr. Bacon) Now, Mr. Nixon, will you explain this exhibit to us?

A. This exhibit shows the Norfolk and Western hopper cars that were on the tracks of the Wabash Railroad Company, or on tracks of other railroads that operate through the State of Missouri, and these cars on those

railroads had to be in Missouri as of that date to be counted.

Q. Is that what you mean by on-line and off-line?

A. Yes, sir. On-line is Wabash Railroad tracks, and [Tr. 79] off-line is any other railroad tracks.

Q. So this exhibit shows, from your records, Norfolk and Western hopper cars anywhere in Missouri?

A. Yes, sir.

Q. Either on-line or off-line?

A. Yes, sir.

Q. On December 1, 1964 and on January 1, 1965?

A. Yes, sir.

Q. And this exhibit excludes the Wabash and the old Nickel Plate hopper cars?

A. Yes, sir.

Q. All right, sir. Will you give us the totals for December 1, 1964?

A. There was a total of 165 units, whose original cost was \$868,840, and the depreciated value was \$438,946.

Q. As of January 1, 1965, what are the totals?

A. There were 155 cars, the original cost was \$849,236, depreciated value was \$452,699.

Q. All right, sir, thank you. I now hand you Exhibit 15 and ask you to state what this is.

A. This is a statement of the coal cars loaded daily, by regions, from October 16 to December 31, 1964, inclusive.

Q. Now, was this exhibit, which is made up of three pages, prepared under your direction and under your supervision?

A. Yes, sir.

[Tr. 80] Q. Was it made from the records of your company, which records were kept in the ordinary course of business?

A. Yes, sir.

Q. Are these figures accurate and correct?

A. They are.

MR. BACON: We now offer in evidence Exhibit 15.

MR. BRANNOCK: Well, I have made an objection that carries clear through.

At this time, I would like most forcefully to renew the objection, however. This is so wholly incompatible with the issue in this case that I certainly can't see why the Commission wants to listen to it.

CHAIRMAN PHILLIPS: We will let it go in the record for what it is worth.

Mr. Bacon, proceed.

Q. (by Mr. Bacon) Will you explain with regard to Exhibit 15, Mr. Nixon, would you tell us generally how you compiled these figures?

A. These are compiled from daily reports that we get by regions, showing the number of cars of coal loaded.

Q. And the regions that you have shown here are the same regions which you have described to us heretofore in the way you define your regions?

A. Yes, sir.

[Tr. 81] Q. All right, sir. Skipping all of the detail on pages 1 and 2, since that is there for examination, would you by regions give, for the record, the average loadings in each region for the period shown?

A. For the Atlantic & Pocahontas Region, the average loading, the average daily loading, was 4,488.6 cars; the Lake Region was 436.9; and the Western Region was 55.1.

Q. And Missouri is in the Western Region?

A. Yes, sir.

[Tr. 82]

Q. I hand you now Exhibit No. 17, Mr. Nixon, and I will ask you to state what that Exhibit 17 is.

A. Exhibit 17 shows the coal shipments by Norfolk and Western, originating in West Virginia, Virginia, Kentucky, and Ohio, showing destination by areas and states, for the year 1964, and the figures are in tons.

Q. Did you have this prepared under your direction and supervision?

A. Yes, sir.

Q. Made up from the regular records of your company, kept in its ordinary business?

A. Yes, sir.

Q. Are the figures shown on this exhibit correct and accurate?

[Tr. 83] A. Yes, sir.

MR. BACON: We offer in evidence Exhibit 17. I understand that it is received subject to the same objection.

CHAIRMAN PHILLIPS: All right. Let it be entered for what it is worth.

Q. (by Mr. Bacon) Now, Mr. Nixon, you have this broken down, this coal that originates in West Virginia, Virginia, Kentucky, and Ohio, and you have it broken down into destinations, some by state and some by area, I suppose; will you tell us what you mean when you use under the word "Destination" the word "Tidewater"?

A. "Tidewater" is coal that is loaded at these points that go to Norfolk, Virginia, and is dumped out of the cars into boats for shipment on the ocean.

Q. Now, what do you mean when you say "Lakes Docks"?

A. That is coal mined in these states on our lines that go to Sandusky, Ohio, for dumping into the dock there for movement by boat to utilities and industries on the Great Lakes.

Q. What do you mean by "River Docks"?

A. Coal that is loaded in these states that goes to the Ohio River where we have a dumping operation, we dump coal from cars into barges for movement along the river to final destination.

Q. And "All-Rail"?

[Tr. 84] A. That is coal that moves from these states to its final destination by railroad, all the way.

Q. Now, continuing to refer to this exhibit, I see that you have put California and Colorado in brackets, and you have typed in "equals .0026 of total tonnage," will you explain what you mean by that figure?

A. These figures is a breakdown of the all-rail tonnage to the various states that were its destination point, shows the volume. And you will note that there was none of this coal that was mined and loaded on the Norfolk and Western that went to the State of Missouri. And there was only two states on which the coal could have gone through the State of Missouri, and that is California and Colorado. And the tonnage to California and Colorado equals .0026 of the total tonnage of coal mined in these states.

Q. Now, Mr. Nixon, based on your experience with the company and your knowledge of the movement of the cars and need for cars, or any records that you might have, do you have any figures or any judgment as to the number of cars on the old N & W under load per day? I am talking about hopper cars. We are still talking about the coal movement in the hopper cars.

A. Yes. We maintain daily reports that show the number of cars of coal under load at certain locations, such as Norfolk, Virginia, and coal that is under load and enroute to Norfolk, Virginia, or stored on line that is eventually going to Norfolk, [Tr. 85] and we have figures that shows the cars of coal that is under load for our Lake dock at Sandusky, and also for our river dock at Keno, Virginia—and the total of these cars will run around 25,000 cars every day.

Q. That is daily cars, under load?

A. Yes, sir.

Q. You said under load daily?

A. Yes, sir.

Q. Can you tell us whether or not this total of cars under load daily, in that N & W area back there, has changed any since the date of the lease?

A. No, sir; it hasn't. The operation continues to be the same.

Q. The operation of the coal business—

CHAIRMAN PHILLIPS: Will you raise your objections? He isn't here.

MR. BACON: Put it in the record that he objects to it as immaterial and irrelevant.

Q. (by Mr. Bacon) Now, Mr. Nixon, based on all the factors that we have discussed here, based on all the information in these exhibits that you have prepared and we have offered to the Commission, and based on your own knowledge of the need and use of this hopper equipment, do you have a judgment as to how many of these N & W hopper cars would have come into Missouri on a given date?

[Tr. 86] A. I don't foresee any change in the operation, particularly in the use of these hopper cars, that would bring about any change in the number of these Norfolk and Western cars that would be in the State of Missouri, over and above what our records have shown.

Q: By "records have shown," you mean your records of the Norfolk and Western cars here on December 1 and January 1?

A. Yes, sir..

Q. December 1, 1964 and January 1, 1965?

MR. BRANNOCK: That is so wholly immaterial.

COMMISSIONER HUTCHISON: You have been saving objections, haven't you?

MR. BACON: Yes.

CHAIRMAN PHILLIPS: He saved them.

MR. BRANNOCK: I just hate to see the record burdened with such evidence.

CHAIRMAN PHILLIPS: Let them be introduced for what they are worth.

Q. (by Mr. Bacon) You referred back to what your records showed on December 1 and January 1, those

figures are shown on this exhibit which is now in the record?

A. On Exhibit 14. And they showed a total of 165 Norfolk and Western hopper cars in Missouri on December 1, 1964, and 155 cars on January 1, 1965.

Q. All right, sir. Now; I will hand you Exhibits marked [Tr. 87] 18 and 19. Take a look at them and we will treat them individually.

First, dealing with Exhibit 18, will you tell us what that is?

A. It is a statement of the "Open Top Hopper Cars Formerly Owned and Leased by New York, Chicago & St. Louis (Nickel Plate) and Now Owned or Leased by Norfolk and Western, as of January 1, 1965."

Q. How about 19?

A. Exhibit 19 is a statement of "Coal Hopper Cars Formerly Owned and Leased by New York, Chicago & St. Louis (Nickel Plate) and Now Owned by Norfolk and Western, and Which Were in Missouri On-Line and Off-Line on December 1, 1964 and January 1, 1965."

Q. Were these both prepared under your direction and at your supervision?

A. Yes, sir; they were.

Q. And the figures used to come to these results were obtained from your regular business operating records?

A. Yes, sir.

Q. And you are testifying as to the correctness and accuracy of these figures?

A. Yes, sir.

MR. BACON: We offer in evidence Exhibits 18 and 19.

[Tr. 88] MR. BRANNOCK: Those are objected to as being unduly repetitious and wholly irrelevant, and should be excluded.

CHAIRMAN PHILLIPS: They may be entered for what they are worth.

MR. BACON: These deal with Nickel Plate cars rather than N & W.

Q. (by Mr. Bacon) Directing your attention first to Exhibit 18, will you tell us what it is and explain it for us, please?

A. It shows on January 1, 1965 the New York, Chicago & St. Louis, or Nickel Plate, had a total of 5,334 cars, whose original cost was \$21,392,431, and depreciated value was \$9,201,771.

Q. And as we have used depreciated value all through here, that means depreciated according to the regular 5 percent a year depreciation which is allowed by the Tax Commission?

A. Yes, sir.

Q. All right, sir. Exhibit 19, will you explain that for us, please, sir?

A. This shows the number of units of these Nickel Plate hoppers that were either on-line or off-line in the State of Missouri on December 1, 1964, which was 21, and their original cost was \$94,895, with a depreciated value of \$47,496.

And on January 1, 1965, there were 8 of these cars [Tr. 89] in Missouri, with an original cost of \$34,198, and a depreciated value of \$18,909.

Q. Now, Mr. Nixon, once again based on the factors that we have been discussing and all the exhibits in evidence, as to the movement and placing and need of cars, and based on your own knowledge and your position as the Assistant Manager for Transportation, do you have a judgment as to how many of the cars, hopper cars, that is, which are included in Exhibit No. 18 would have been in Missouri on a given date?

A. I think that the figures on Exhibit 19, which showed 21 on December 1 and 8 on January 1, are representative of what we can expect in the future, because the movement of coal on the former Nickel Plate from its Eastern Ohio fields to the Great Lakes and Chicago will continue in effect, and I see no change in that.

* * * *

[Tr. 95]

Q. Now, Mr. Nixon, I hand you Exhibit No. 23, and ask you to state what that is.

A. This is a recap of depreciated values of rolling stock, shown on Exhibits 9, 11, 12, 18, 20, 21, and 22.

Q. And this is made up by you from the other exhibits which are in evidence here before us?

A. Yes, that's right.

Q. And is merely a compilation or a recap of the totals shown on those exhibits?

A. Yes, sir.

Q. Now, before offering it for explanation, I see you have the word "Less" and some figures written down at the bottom, will you explain those?

A. Well, the figures above show the depreciated value of all these units, units that never came into the State of Missouri. However, we had the exhibit that showed that there were a few hopper cars with the Norfolk and Western and a few hopper cars of the Nickel Plate that were in the State of [Tr. 96] Missouri, either on-line or off-line.

So to get a correct figure of the depreciated value of equipment that doesn't come into Missouri, we had to deduct the estimated depreciated value of that small number of cars that did come into Missouri.

Q. So the total shown on Exhibit No. 23 of \$345,636,123 represents what?

A. It represents a net depreciated value of all equipment that doesn't come into the State of Missouri.

MR. BACON: I offer in evidence Exhibit 23.

MR. BRANNOCK: Same objection.

CHAIRMAN PHILLIPS: Same ruling.

[Tr. 97]

• • • •

DONALD E. BRUMMITT,

being sworn, testified as follows:

DIRECT EXAMINATION

by Mr. Bacon:

Q. Would you please state your name?

A. Donald E. Brummitt.

Q. You have been sworn in this matter?

A. Yes, sir.

Q. Where do you live?

A. Roanoke, Virginia.

Q. Are you presently employed by the Norfolk and Western Railway?

A. Yes, sir.

Q. When were you employed by them?

A. October 16, 1964.

Q. And what is your present title or capacity with the Norfolk and Western Railway?

A. Director of Real Estate.

Q. Generally speaking, what do your duties encompass?

A. All matters pertaining to sale, purchase and lease of real estate, and in charge of ad valorem property taxes.

Q. Before you went with the Norfolk and Western, by whom were you employed?

A. Wabash Railroad Company.

Q. When did you go with the Wabash Railroad Company?

[Tr. 98] A. 1929.

[Tr. 99] • • • •

Q. Now, do you know, Mr. Brummitt, what the depreciated value of the rolling stock of the Wabash Railroad was as of January 1, 1965? I am jumping now to January 1, 1965.

A. You are talking about the 1965 assessment or the 1964 assessment?

Q. I am going to get these two figures in now. Yes, I want the 1965 figures.

A. As we computed it?

Q. Because I used them in my opening remarks.

The depreciated value, it was eighty-two something.

A. Oh, \$82,456,813.

Q. All right, sir. Now, will you give me the depreciated value of the rolling stock of anything owned, leased or used by Norfolk and Western as of January 1, 1965?

A. \$513,309,877.

Q. All right, sir. Now, let's go back to 1964. Are you familiar with and do you know the assessed value placed on the Wabash properties for January 1, 1964?

A. Yes, sir. \$20,409,862.

Q. Out of that assessment, did you have the information as to the assessment placed on rolling stock?

A. Yes, sir. I will have to explain how that was made up to give you a true picture.

Rolling stock, \$9,177,683, plus road and buildings of \$12,092,594. From the sum of those was deducted the amount [Tr. 100] of \$860,415, resulting in the final assessment of \$20,409,862.

Q. Mr. Brummitt, if on the return for January 1, the Wabash system was used and the Wabash properties were used, and using the depreciation schedules and adjustments used by the Tax Commission, have you computed what the assessed value would be on that system and on those properties?

A. On the rolling stock, \$10,103,340.

Q. All right, sir. At my request, Mr. Brummitt, did you have prepared under your direction and supervision a study of what we call a ton mile per mile in Missouri, compared with ton miles per mile over the entire operation of the N & W?

A. I did.

Q. First off, will you tell us what does the term "ton mile per mile" mean?

A. "Ton mile per mile," net ton mile per mile is a ton of freight moved one mile in relation to the district in which you are figuring. For a state, it would then be divided by the number of miles in that state.

MR. BRANNOCK: At this time, I want to object to this line of testimony. I think it is wholly irrelevant to the issue before this Commission.

MR. BACON: We propose to show—unless we are going to do it the same way—by this witness that this study,

Mr. Chairman, there is a very direct relationship between the ton mile per mile of road and the equipment used to [Tr. 101] haul that.

MR. BRANNOCK: I, again, move that it not be considered in evidence. It is wholly irrelevant. Ton mile has no relation to the value of this rolling stock for ad valorem tax purposes for the year 1965.

CHAIRMAN PHILLIPS: We will let it be introduced for what it is worth.

You might follow the same procedure, if you have any more. It will expedite it.

Q. (by Mr. Bacon) Go ahead, will you, tell us first what a ton mile per mile is.

A. It is one ton moved one mile in relation to the miles being considered.

Q. Could you elaborate just a little bit more on that?

A. If you move, say, just one ton of freight one mile over a line that is ten miles long, your ton miles per mile then would be 1-10th of a ton mile per mile.

Q. Is it the tons moved over a given mile of roadway, in a year?

A. No.

Q. Or in a given time?

A. No. It is that ton moved one mile over a given length.

Q. Over a given length?

A. Yes.

[Tr. 102] Q. Now, is there a direct relationship, Mr. Brummitt, between a ton mile per mile in a given area and the rolling stock used in that area?

A. Yes, sir. It is a good measure of the rolling stock required to move that freight, the cars, the locomotives, the more tonnage you move the more power you have to have, the more cars you have to have to move it, or larger cars to move it. It bears a very close relationship.

Q. Well, will you give us the result then of the study that I asked you to make, and that is of the ton mile per mile in Missouri compared with the ton mile per mile of the entire Norfolk and Western operation?

A. Ton miles of freight moved over the entire new Norfolk and Western operation amounted to 6,036,000 per mile of road for the 7,577 miles contained in the entire Norfolk and Western.

Yet during this same period in Missouri, there was only handled 3,262,000 ton miles per mile of road in Missouri for the 627.61 miles, or approximately in Missouri only 54.04 percent of the system average per mile of road.

Q. All right. Now, how do you apply that figure to the depreciated values of rolling stock which have been considered by the Commission at arriving at the assessment in this case?

A. Well, the depreciated value of the system rolling stock as obtained from Form 1-A was the \$513,309,879. This [Tr. 103] allocated to Missouri as the Commission does, on a mileage basis, amounted in Missouri to \$42,514,377.

But giving consideration to the use of this road mileage in Missouri, the much lower use and occupancy by rolling stock of the 54.04 percent produced \$22,974,769. Applying the factor of 47 percent produces a value of rolling stock in Missouri of \$10,798,141.

Q. In other words, what you have done, you have taken the track formula, the results of applying the track formula and have applied another factor?

A. Yes, sir.

Q. In order to arrive at a more accurate evaluation of the rolling stock which is actually used in Missouri?

A. That's right.

Q. Now, at my request, Mr. Brummitt, did you have a study made to determine the actual units of rolling stock actually used, owned or leased by N & W in Missouri on January 1, 1965 and the depreciated values of

those units? When I say in Missouri, I mean off-line and on-line.

A. I did; yes, sir.

Q. All right, sir. I will hand you Exhibit 25. Is Exhibit 25 the result of this study which I asked you to make?

A. It is.

Q. This deals now with January 1, 1965 and shows the units and the value of those units owned or leased by N & W [Tr. 104] in Missouri on that date, whether off-line or on-line?

A. That is correct.

MR. BRANNOCK: We object to any testimony based on this study for the reason that it is immaterial whether or not it was in Missouri or used in Missouri on January 1, 1965. The system, as a whole, is under consideration here and that is what we are trying to ascertain the value of with relation to Missouri, not just what was in Missouri. That would be based on trackage.

MR. BACON: Is it the same—or shall I make my rebuttal? What I mean, this is an actual study of records done at great detail to find what was here. Now, your basic premise is that the trackage formula comes up with a result which is so far away from the value of the actual property, with the proper tax situs here, that the result obtained under the track formula is unconstitutional. This is the yardpost. This is the starting gate, Mr. Brannock, that we go from.

CHAIRMAN PHILLIPS: The same fuling—received for what it is worth.

MR. BRANNOCK: We have to follow the statute and in the purview of the statute this exhibit has no meaning.

[Tr. 105] MR. BACON: I understand, Mr. Chairman, it is received subject to the objection for its probative value, for what it is worth.

I haven't even offered it yet. You understand I had asked him to say what it was

MR. BRANNOCK: Now, I object to the testimony on it.

MR. BACON: All right, sir.

CHAIRMAN PHILLIPS: Same ruling on the testimony.

Q. (by Mr. Bacon) I think, Mr. Brummitt, you better testify concerning—was this made under your direction?

A. It was; yes, sir.

Q. Under your supervision?

A. Yes, sir.

Q. Made from records of your company which are kept in the ordinary course of business and from the records you obtained from others?

A. Yes, sir.

Q. Are you in a position to testify that the figures shown on here are accurate and correct?

A. Yes, sir; they are.

Q. Now, with that foundation, we will offer the exhibit.

MR. BRANNOCK: I move that the exhibit not be accepted in evidence for the reason that it has no [Tr. 106] meaning within the application of the statute to the property of Norfolk and Western Railway for the purpose of ad valorem taxes for the year 1965, which is under consideration by this Commission, in that it is inconsequential, and has no meaning.

CHAIRMAN PHILLIPS: Sustained. Let it in for whatever it is worth.

Q. (by Mr. Bacon) Now, Mr. Brummitt, I want you to tell us, so it will be clear in the record, as to how you went about obtaining the figures which now make up this Exhibit No. 25? How you did it?

A. First, we obtained from our car accountants, from the records they used to keep in the ordinary course of business, the cars on the Wabash lines in the State of Missouri, as of January 1, 1965. Also from the car accountants, the cars that had been delivered to any other railroad operating in the State of Missouri just prior to January 1, 1965.

We then sent the list of cars on foreign lines in Missouri, such as the Frisco, and asked them to check off those cars that were actually in the State of Missouri on January 1, 1965. We received answers from all the roads operating in Missouri as to the N & W cars on their lines, that were in Missouri on January 1.

We obtained from our superintendent the motive power that was located in the State of Missouri on January 1, 1965.

[Tr. 107] We then applied against these units the original cost obtained from the valuation department by year of acquisition. That is 1950 and prior, and so on through 1964, applied the same depreciation rate used by the Commission to these values, and obtained a grand total depreciated value of all N & W equipment in the State of Missouri on January 1, 1965, whether on Wabash lines or foreign lines, amounting to a total of \$16,230,420.

After applying the 47-percent factor employed by the Commission, obtained a value of \$7,628,297.

Just for the sake of clarification, that \$7,628,297 compares with the approximately twenty million dollar figure established by the Commission, using just the road mile basis.

Q. Now, I notice that you have at the top of the columns the years from 1950 through 1964!

A. Yes, sir.

Q. Why is it broken down that way?

A. That was the year of acquisition so we could apply the proper depreciation rate as used by the Commission.

Q. Am I correct then that this report which makes up Exhibit 25 deals with the actual identifiable units of rolling stock?

A. That's correct.

Q. In Missouri, whether off-line or on-line?

A. There were actually no formulas applied to it or [Tr. 108] anything.

Q. And the depreciated value was, as you have given it, \$16,230,420?

A. Correct.

Q. Before your 47-percent factor was applied?

A. Yes, sir.

Q. What was the total number of units in Missouri on January 1, 1965?

A. 3,231.

Q. And you have broken this down further under your sub-headings of freight cars, diesel locomotives, work equipment, passenger train, pullman car?

A. Yes, sir.

Q. So that this includes the total rolling stock owned or leased by Norfolk and Western in Missouri on January 1, 1965?

A. Yes, sir.

MR. BACON: All right; sir. I am sure I offered it, but to make sure we will offer Exhibit No. 25 in evidence. I am confident we did, but just to make sure.

MR. BRANNOCK: Then I renew the objection previously made to this and other exhibits for the reason that it is not within the purview of the statute and, therefore, has no meaning to this Commission.

CHAIRMAN PHILLIPS: Same ruling.

Q. (by Mr. Bacon) Mr. Brummitt, I hand you exhibits [Tr. 109] marked 26, 27, 28 and 29, and I will ask you to state what they are, generally?

A. These are statements covering the total rolling stock owned or leased by the Wabash Railroad Company in the State of Missouri on April 1, 1964, on July 1, 1964, and on October 1, 1964, and the total rolling stock owned or leased by the Norfolk and Western Railway Company in the State of Missouri on December 1, 1964.

Q. Now, were these exhibits made under your supervision and at your direction?

A. They were.

Q. And were they compiled from figures and in the same manner that the same exhibit for January 1 was made up?

A. Exactly the same; yes, sir.

Q. Done the same way?

A. Yes, sir.

Q. And are you satisfied as to the correctness and accuracy of the statements and figures given on these exhibits?

A. I am.

MR. BACON: I will offer at this time Exhibits 26, 27, 28 and 29.

MR. BRANNOCK: Preliminary to objection, is the figure the same as you turned in to this Commission for tax purposes, \$5,891,388, as of April 1, 1964?

WITNESS BRUMMITT: What was this figure, Mr. [Tr. 110]. Brannock?

MR. BRANNOCK: Total rolling stock.

MR. BACON: Which exhibit are you referring to?

MR. BRANNOCK: I am referring to Exhibit—I don't see that it is numbered.

MR. BACON: For what date?

MR. BRANNOCK: April 1, 1964. I said before in the amount of \$5,891,388.

WITNESS BRUMMITT: That figure has never been furnished this Commission.

MR. BRANNOCK: And you don't furnish this Commission any figures as of April 1 on any year, do you?

WITNESS BRUMMITT: Not to my knowledge, we have not.

MR. BRANNOCK: Then I move that it not be accepted in evidence, as not being within the purview of the statute. The only date that this Commission is concerned about is January 1 of any year, and specifically January 1, 1965. I move that it not be accepted.

MR. BACON: Mr. Brannock, we have given you the figures of January 1, 1965. This lease took effect in October, 1964. We have prepared these studies showing

the actual units on various dates to show what, if any, changes took place as far as Missouri was concerned after the lease, as before the lease. We don't say these are taxable dates. These were given to show [Tr. 111] the relationship of the one set of figures to another, and to give you and the reviewing body a picture of any change, if any, which took place as far as the actual units of rolling stock in Missouri.

MR. BRANNOCK: I renew the objection. It is clearly inadmissible in evidence for the reasons that I have previously stated. April 1 is meaningless for the purposes of assessment of taxes. July 1 is meaningless. October 1 is meaningless. December 1 is meaningless.

MR. BACON: We feel it is incumbent upon us to give to the Commission material over a spread of time to assist in arriving at the average value of rolling stock used in Missouri. We are trying to give the full picture to the Commission so the average can be stricken rather than picking out just one day.

MR. BRANNOCK: Nowhere in Chapter 151 is average referred to or given as the basis by which this Commission shall assess the property of railroads. The only date that is given is January 1. Any other date is of no consequence. I renew the objection for that further reason.

CHAIRMAN PHILLIPS: We will enter it in for what it is worth.

MR. BRANNOCK: As a further preliminary question [Tr. 112] to objection, I would like to ask the witness if there could be as much as a 40-percent variation in these figures?

WITNESS BRUMMITT: A 40-percent?

MR. BRANNOCK: Yes.

MR. BACON: What figures, Mr. Brannock?

MR. BRANNOCK: As reflected on any of these exhibits and as turned in to this Commission, as of January 1.

MR. BACON: Well, I will object to that question for the reason that this doesn't purport to be anything that

is requested by the Commission on its return. We have given you all the information we possibly could as to the rolling stock. We are here, Mr. Brannock, to show from detailed studies, laboriously made, the actual rolling stock in Missouri on a whole bunch of dates either before and after, because one of our basic premises in this whole hearing is that we want this Commission and the court to know the great discrepancy between the assessed value arrived at by applying the track formula alone and the depreciated value of the actual rolling stock in Missouri, and strike an average across the year. That is the whole premise of why we are here.

CHAIRMAN PHILLIPS: Mr. Bacon, did I understand [Tr. 113] you earlier to say that you were using a depreciation factor for the State of Missouri and the equalizing factor, have we discontinued that on these figures?

MR. BACON: No, sir.

CHAIRMAN PHILLIPS: Then I feel the witness should be able to answer whether there would be a difference of 40 or 50 percent, one month from the other.

MR. BACON: He didn't ask that. He asked if there was a 40 or 50-percent discrepancy between this figure and the figure reported on the tax return—that was his question. And I objected to that for the reason these don't purport to have anything to do with any figures shown on what you asked for in a return.

MR. BRANNOCK: Well, he is objecting to that question. What is the ruling of the Commission on that question? Shall the witness answer?

CHAIRMAN PHILLIPS: Can you rephrase the question?

MR. BRANNOCK: Well; Mr. Bacon—

CHAIRMAN PHILLIPS: Mr. Bacon is not the witness.

MR. BRANNOCK: I am going to ask Mr. Bacon to rephrase it in a manner that will be agreeable to him, if that doesn't state it.

CHAIRMAN PHILLIPS: As I understand it, I believe he asked the question then, is it possible from these figures to have a variation from month to month of 40 [Tr. 114].

percent, a month-to-month variation of equipment on the rolling stock of the Wabash Railroad?

MR. BACON: If that is the question, I have no objection.

CHAIRMAN PHILLIPS: I think the witness is qualified to answer.

WITNESS BRUMMITT: What figures vary, you mean 40 percent?

CHAIRMAN PHILLIPS: The figures you gave as the valuation of your rolling stock.

WITNESS BRUMMITT: The total value?

CHAIRMAN PHILLIPS: Yes, sir.

WITNESS BRUMMITT: I wouldn't think they would vary by 40 percent, by as much as 40 percent; no, sir.

MR. BRANNOCK: I think the Chair has previously ruled that this can go in for what it is worth, over my objection, wasn't that the ruling?

CHAIRMAN PHILLIPS: That is the ruling.

Q. (by Mr. Bacon) All right, sir. Let's turn our attention then to Exhibit 26, which has to do with April 1, I believe that is the one we were talking about, and you have stated you compiled these figures in the same manner in which you compiled the figures for Exhibit 25?

A. Yes, sir; that's correct.

Q. And all done under your supervision and at your [Tr. 115] direction?

A. Yes, sir.

Q. You got your car accounts and then you had your values applied in the same manner?

A. Yes, sir.

Q. All right, do you show date of acquisition of each of the units involved?

A. That's correct.

Q. Now, will you give us, sir, the result of the study then for April 1, 1964, as it is reflected on Exhibit 26?

A. The depreciated value of all rolling stock owned or leased by the Wabash Railroad Company in the State of Missouri, on April 1, 1964, is \$12,534,869. After application of the 47 percent, we obtain a value of \$5,891,388.

Q. All right, sir. Will you turn your attention to Exhibit 27? Was Exhibit 27 prepared at your direction and under your supervision?

A. It was.

Q. It deals with actual identifiable units of rolling stock present in Missouri?

A. Yes, sir.

Q. You got the date of acquisition, the original cost, and then applied the depreciation we have been talking about?

A. Yes, sir.

Q. All right, sir. Will you give us the results of your [Tr. 116] study presented by Exhibit 27 for July 1, 1964?

A. This shows the total rolling stock owned or leased by the Wabash Railroad Company in the State of Missouri, on July 1, 1964, the depreciated value of all of this equipment, \$15,112,534. And after application of the 47 percent, \$7,102,891.

Q. How many units on that date?

A. There were 3,077 units.

MR. BRANNOCK: I again renew my objection and state that it is of no importance to this Commission, nor is it of evidentiary value to this Commission, anything that the Wabash Railroad owned in the year 1964.

The question before this Commission is the value of the property of the Norfolk and Western Railway as of January 1, 1965. And I again move that these exhibits be stricken and all testimony regarding the Wabash Railroad for the year 1964 be stricken.

CHAIRMAN PHILLIPS: We will receive it for what it is worth.

MR. BACON: I thought we had offered all four and the objection was made to all four, and that they were to be considered in evidence subject to the objections, so we could go right ahead with the inquiry.

MR. BRANNOCK: With that understanding, we will [Tr. 117] proceed. I object to any answers founded on these exhibits.

Q. (by Mr. Bacon) Now, Mr. Witness, Exhibit 28 is what?

A. Exhibit 28 is a statement showing the total rolling stock owned or leased by the Wabash Railroad Company in the State of Missouri on October 1, 1964.

CHAIRMAN PHILLIPS: The same formula is used on all of these?

MR. BACON: Same formula used on all of them.

Q. (by Mr. Bacon) These were made under your direction, supervision, and compiled in the same way as Exhibit 25 and the other exhibits you have identified; is that correct?

A. That's correct.

Q. All right, sir. Will you give us the results of the study as represented by Exhibit 28?

A. On this date, October 1, 1964, there were 2,995 units of equipment, having a depreciated value of \$15,464,817. And after application of the 47-percent factor, produces a value of \$7,268,464.

Q. You are satisfied as to the correctness and accuracy of those figures?

A. Yes, sir.

Q. I turn your attention to Exhibit 29.

A. Exhibit 29 is the total rolling stock owned or leased by the Norfolk and Western Railway Company, in the State of [Tr. 118] Missouri, on December 1, 1964.

Q. Was this study made the same way, that you made the study which resulted in Exhibits 25, 26, 27 and 28?

A. It was.

Q. And made under your supervision and direction?

A. Yes, sir.

Q. Are you satisfied to the correctness and accuracy of the figures represented on Exhibit 29?

A. I am.

Q. Will you give us the result, please, of a study for December 1, 1964, as represented by Exhibit 29?

A. All the rolling stock owned or leased by the Norfolk and Western Railway Company in the State of Missouri,

on December 1, 1964, was 3,117 units, having a depreciated value of \$15,282,075. And after application of the 47-percent factor, produces a value of \$7,182,575.

MR. BACON: May we have it understood that Exhibits 25 through 29 were offered and were received, subject to the objection?

MR. BRANNOCK: That's right.

CHAIRMAN PHILLIPS: Yes, sir.

Q. (by Mr. Bacon) At my request, Mr. Brummitt, had you used the totals shown on these exhibits to arrive at a certain average of the figures shown on those exhibits?

A. Yes, sir.

[Tr. 119] Q. All right. I will ask you to take the exhibits which reflect the number of units in Missouri on January 1 and December 1.

A. Yes, sir.

Q. All right, have you compiled the average number of units as represented in those two studies?

A. I have.

Q. What is that average?

A. 3,174 units.

Q. Now, this was after the lease went into effect on October 16; was it?

A. We are talking about December of 1964 and January of 1965; yes, sir.

Q. Did you compute the average depreciated value of all of the rolling stock shown on those two, for December 1 and January 1?

A. I did, and that average amount was \$7,405,436.

Q. All right, sir. Have you, at my request, computed the average number of units shown on the exhibits representing studies as of April 1, July 1, and October 1?

A. I have.

Q. What is the average?

A. The average unit is 2,871.

Q. Did I ask you also to compute the average value of the rolling stock of all the units as shown on your studies for [Tr. 120] April 1, July 1, and October 1?

A. Yes, that average amounts to \$6,750,247.

Q. Now, did I ask you to put all five of these studies together and compute the average number of units shown on all five of these studies represented by Exhibits 25 through 29?

A. You did, and that average amounts to 2,992 units.

Q. Did I ask you to do the same thing for average of value as shown by these same five exhibits?

A. Yes, sir; and that average amounts to \$7,014,723.

Q. Mr. Brummitt, I think probably the last question: Why did you select this spread of dates over the year up to January 1 for the purpose of your studies in preparing these exhibits?

A. They are the end of each quarter in 1965. December 1 was chosen because of an average possibly between the date of the lease, October 16, and January 1. We felt that this gave a representative view of the entire year.

Q. Both before and after the effective date of the lease?

A. Yes, sir.

[Tr. 121]

Q. (by Mr. Bacon) Referring, Mr. Brummitt, to Exhibits Nos. 25 and 29, and to shorten it up, Exhibit 25 is the result of your study as of January 1, 1965, 29 is the result of your study as of December 1, 1964. Now, I want to make sure that in explaining these exhibits you have clearly indicated in the record what is included in these two exhibits insofar as the rolling stock is concerned, owned, leased, or otherwise—what does it encompass?

A. These two exhibits, covering December 1, 1964 and January 1, 1965, cover the rolling stock, owned or leased by the Norfolk and Western Railway Company, located in the State of Missouri, any place in the State of Missouri on those particular dates.

Q. That includes the leased Wabash cars and everything?

A. Everything; yes, sir.

Q. Now, with regard to Exhibits Nos. 26, 27 and 28, they deal respectively with your studies of April 1, July 1, and October 1; will you tell me what cars these exhibits encompass?

[Tr. 122] A. These exhibits cover the rolling stock owned or leased by the Wabash Railroad Company, located in the State of Missouri, on those particular dates.

MR. BACON: All right, sir, thank you.

Now, Mr. Chairman, Mr. Brummitt testified with regard to this ton mile study he made, and he used notes. They were in an exhibit form, Exhibit No. 24. And for ease of review, we would like to offer 24, Exhibit 24, in evidence.

MR. BRANNOCK: Same objection.

CHAIRMAN PHILLIPS: Same ruling.

MR. BRANNOCK: I renew my objection also to Exhibits 25 and 29, in that they only reflect property in Missouri and not for the taxable date, therefore are totally and wholly irrelevant.

MR. BACON: With regard to Exhibit 24, which we offered in evidence, perhaps I should ask Mr. Brummitt just to take a look at it and testify for the record that Exhibit 24 represents and gives the figures which we gave orally in evidence in discussing the ton mile per mile study that he made.

WITNESS BRUMMITT: It does; yes, sir.

MR. BACON: And you made those up?

WITNESS BRUMMITT: Yes, sir.

MR. BACON: They are correct?

[Tr. 123] WITNESS BRUMMITT: They are correct.

MR. BRANNOCK: Same objection.

CHAIRMAN PHILLIPS: Same ruling.

MR. BACON: Mr. Chairman, I believe that concludes our presentation.

CHAIRMAN PHILLIPS: This will conclude the hearing.

July 6, 1965

BEFORE THE STATE TAX COMMISSION OF
MISSOURI

FILE No. 1965-6

In the matter of the 1965 Ad Valorem Assessment of
the Norfolk and Western Railway Company.

Findings of Fact, Conclusions of Law and Decision

FINDINGS OF FACT

The Petitioner, Norfolk and Western Railway Company, is incorporated under the laws of the Commonwealth of Virginia with its principal office and place of business in Roanoke, Virginia; The Wabash Railroad Company is incorporated under the laws of Ohio with its principal offices and places of business in Wilmington, Delaware and Philadelphia, Pennsylvania. Norfolk and Western Railway Company owns no track or roadbed within Missouri but leases all of the track, roadbed, rolling stock and all other property owned by the Wabash Railroad Company in this State, pursuant to a lease dated March 1, 1961, as amended October 1, 1964, effective as of October 16, 1964. Petitioner owns and leases an extensive railway system which it operates in States other than the State of Missouri.

Pursuant to the information submitted by Petitioner to the Commission on Form 1, on May 15, 1965, the State Tax Commission of Missouri, on June 2, 1965, placed a total assessed valuation of \$31,298,939 on Petitioner's property in Missouri for taxes for the year 1965.

Said Assessment included an assessed value for roadbed in the amount of \$11,677,875; for buildings in the amount of \$499,722; and for rolling stock in the amount of \$19,981,757, less \$860,415, which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts.

To arrive at assessed value of rolling stock taxable in the State of Missouri, the Commission determined the assessed value of the entire rolling stock of the Petitioner, wherever situated, for the year 1965, to be in the amount of \$513,309,877. This was arrived at as in all other railroad assessments made by the State Tax Commission of Missouri, by taking the original cost of the equipment by the year of acquisition and allowing five percent depreciation per year but with a maximum depreciation of Seventy-five percent of original cost. Thereafter, in this case, as in the case of all railroad assessments for the year 1965, a factor of forty-seven percent was applied by the State Tax Commission resulting, in this case in the figure of \$241,255,643. The track formula was then determined and it was found that 8.2824 percent of all of the main and branch line tracks owned or leased everywhere by Petitioner, were leased, owned, or controlled by Norfolk and Western in Missouri. This percentage of the above value of the depreciated rolling stock was determined to be \$19,981,757 and was by the Commission stated to be the value of the rolling stock properly taxable in Missouri. The figures used in this determination were furnished the Commission by Petitioner in Form 1, which was filed with the Commission.

That from the total value of the fixed property, which includes the roadbed and buildings, assessed in Missouri at \$12,177,597 which property was owned by the Wabash Railroad Company and leased to Norfolk and Western, plus the above assessed value of the rolling stock and all other property, the sum of \$860,415 was deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts, and that as a result of the above method of assessment and computation, a total assessed valuation was made of \$31,298,939.

No assessment has been made against Wabash Railroad Company for the property leased to Petitioner.

The Petitioner, on June 15, 1965, filed a request for adjustment and equalization of assessment and for a hearing with respect thereto, and such hearing was granted and such rehearing heard on June 23, 1965, at the Offices of The State Tax Commission of Missouri, 501 Jefferson Building, City of Jefferson, Cole County, Missouri, and the Commission then considered the assessment placed on said property by it as of January 1, 1965. The Railway and Commission agreed that the hearing held on June 23 constituted an exhaustion of administrative remedies of the Petitioner.

At said hearing, the Petitioner introduced evidence consisting of testimony supplemented by exhibits for the purpose of showing assessed valuation placed by the Commission on the rolling stock of Petitioner was excessive and resulted in an unjustified discrimination against Petitioner in violation of the Constitutions, both of the United States and of the State of Missouri. The Petitioner did not challenge the amount of the assessment on its fixed properties.

The State Tax Commission of Missouri has adopted uniform procedures and methods to determine the true value in money of the railroad property for assessment purposes within the State of Missouri. Such procedures and methods are designed to value all railroad property within the State of Missouri uniformly and equally with all other property within the State of Missouri. Such procedure and methods were used in assessing and valuing the petitioner's property as of January 1, 1965. The evidence failed to disclose that the property of the Petitioner was ever placed on sale in the open market.

Utility company valuations are made by the State Tax Commission as to the distributable property and rolling stock of railroads while other properties are assessed locally by county and township assessors. The relative values of sales ratio assessments and utility assessments are separate and distinct in that there are two methods

used in arriving at values, and there is no basis for comparison between the valuation of the sale of a farm or a home based on revenue stamps attached to the deed and the valuation of utility property which is not being sold frequently, or ever. There is no similarity in these two types of property or in the method of arriving at the valuations for assessing purposes thereof.

CONCLUSIONS OF LAW

All railroads now constructed, in the course of construction, or which shall hereafter be constructed in this State and all property, tangible personal property, and intangible personal property owned, hired or leased by any railroad company or corporation in this State shall be subject to taxation, and taxes assessed on real property, and tangible personal property shall be assessed in the manner set forth in Chapter 151, R.S.Mo.

Property shall be assessed for tax purposes at its true value in money or such percentage of its true value in money as may be fixed by law. There is no such thing as an absolute true value of property. The values mentioned in the Statutes are the valuations of officials whose duty it is to make them. Property, including railroad property, is not a commodity which has a fixed market value at a given period. The value is determined always by the estimate of the party who values it; all presumptions will favor the correctness of the valuations of the officials whose duty it is to make them; and their good faith and the validity of their acts is presumed. The State Tax Commission of Missouri is the sole judge of the credibility of witnesses appearing before it.

Every owner, lessor or party having an interest in property shall have the right to appeal and to a rehearing under rules prescribed by the State Tax Commission. The said Commission shall investigate all such appeals or motions for rehearing or protests of assess-

ments and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious.

In assessing, adjusting and equalizing a railroad property for any year or years, the State Tax Commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the Commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this State and into another state in which a tax is levied and paid on the rolling stock of such road, then the said Commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company.

In determining the total length of the road of railroad company for the purpose of determining its tax assessment, the Commission is required to take into consideration the track which is operated partially under the control of the railroad under trackage agreements as well as that which is owned by the railroad, even though such trackage agreement does not provide for the exclusive use by the railroad of the track in order to require it to be taken into consideration.

The Assessment of the rolling stock of the Petitioner was determined in accordance with Chapter 151, R.S.Mo., particularly Section 151.060-3, in that said assessment was determined by taking that percentage of the total value of all the rolling stock of the Petitioner that the number of miles of the trackage of Petitioner in this State bears to the total length of the road as owned or controlled by Petitioner wherever situated.

Section 151.060-3 R.S.Mo., which prescribes the formula by which the Commission determined the assessed valuation on Petitioner's rolling stock in the State of Missouri, provides a fair and reasonable method to determine that amount of rolling stock of any railroad which extends beyond the limits of the State which may be taxed by this State and does not constitute a violation of any of the rights or privileges guaranteed by the Constitution of Missouri or the Constitution of the United States.

This formula, as used in conjunction with the determination of value using depreciation and a forty-seven percent equalization factor together with the deduction of the economic factor as set out in the Findings of Fact, were used uniformly by the Commission to arrive at assessments of the rolling stock of the various railroads in this State, and to apply this formula to some railroads and not to others would be arbitrary and discriminatory.

The evidence adduced by the Petitioner, does not show that the valuation placed upon the rolling stock of Petitioner was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of Petitioner, nor does the evidence adduced by the Petitioner show that in applying the formula herein indicated that the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner.

DECISION

The Commission, after giving due consideration and study to the records, evidence and data submitted on behalf of the Commission and studying the transcript of the proceedings before it, finds that the valuation of the Petitioner's property for the year 1965 should be as follows: Thirty-One Million Two Hundred Ninety-Eight Thousand Nine Hundred Thirty-Nine Dollars, (\$31,298,939).

IN THE CIRCUIT COURT OF COLE COUNTY,
MISSOURI

Petition for Review of an Order of the Missouri State
Tax Commission

Come now the plaintiffs, Norfolk and Western Railway Company (Norfolk and Western) and Wabash Railroad Company (Wabash), pursuant to Supreme Court Rule 100.03, et seq. and Sec. 536.100, et seq., R.S. Mo., and for their Petition For Review Of An Order Of The State Tax Commission, state:

1. Plaintiff Norfolk and Western is a duly existing corporation under the laws of the Commonwealth of Virginia with its principal office and place of business in Roanoke, Virginia, and is qualified to do business in the State of Missouri; Plaintiff Wabash is a duly existing corporation, incorporated under the laws of the State of Ohio with its principal offices and places of business in Wilmington, Delaware and Philadelphia, Pennsylvania, and is qualified to do business in the State of Missouri.
2. During the year 1964 to October 16, 1964, plaintiff Wabash was engaged in the business of transporting persons and property for hire in Missouri and other states.
3. By written lease, effective October 16, 1964, plaintiff Wabash leased to plaintiff Norfolk and Western its track, roadbed, and other fixed properties in Missouri and elsewhere, along with all of its rolling stock.
4. Since October 16, 1964, plaintiff Norfolk and Western has engaged in the business of transporting persons and property for hire in Missouri, and had prior to and has since such date engaged in the business of transporting persons and property for hire in other states.
5. The defendants are the Missouri State Tax Commission (hereinafter referred to as the "Commission") and the members and Secretary thereof.
6. This proceeding is brought pursuant to Supreme Court Rule 100.03, et seq. and Sec. 536.100, et seq., R.S.Mo.,

to review the Commission's 1965 assessment of plaintiff's distributable property used in Missouri, which assessment was purportedly made under Sec. 138.420 and Sec. 151.060, R.S.Mo.

7. Sec. 138.420 and Sec. 151.060 give the Commission exclusive authority to "assess, adjust, and equalize" the aggregate valuation of the property of railroads except local property which pursuant to Sec. 151.100, R.S. Mo., is assessed by the respective county assessors. Said Sec. 151.060 provides further in section (3) thereof, in part:

"that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

8. Under the terms of said lease aforesaid, plaintiff Norfolk and Western is required as a part of the rent due plaintiff Wabash, to pay the ad valorem taxes assessed against plaintiff Wabash properties. As such lessee and solely for the reason that it is responsible for the payment of said ad valorem taxes under the terms of the lease, Norfolk and Western filed a tax return to the State of Missouri. Norfolk and Western owns no fixed properties or roadbed within the State of Missouri.

9. Purportedly acting under the authority of said Sections 138.420 and 151.060, R.S.Mo., the Commission, on or about June 2, 1965, after including for assessment purposes the distributable property owned by plaintiff Wabash and leased to plaintiff Norfolk and Western, along with all other rolling stock leased or owned by Norfolk and Western, wherever situate or used, arrived at a value of \$31,298,939.00 as being the value of distributable

property properly taxable in the State of Missouri, \$19,981,757.00 representing the assessment against rolling stock and \$12,177,597.00 representing the assessment against fixed properties, less \$860,415.00 deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts. In its notice of assessment, the Commission set June 15, 1965, as the date for a hearing relative to the assessment. Counsel for plaintiffs appeared on said date and filed with the Commission a writing pursuant to Sec. 536.063, R.S.Mo., denominated "Request for Adjustment and Equalization of Assessment, and for hearing with respect thereto", a copy of which writing is attached hereto and marked "Exhibit A". The Commission set the hearing requested by plaintiffs in said writing for June 23, 1965.

10. On June 23, 1965, plaintiffs presented competent and substantial evidence in support of the allegations theretofore submitted to the Commission in the said Exhibit A and inter alia, in proof of the fact that the depreciated value of the units of rolling stock leased or owned by plaintiffs physically present in Missouri on January 1, 1965, after application of the forty-seven per cent (47%) factor allowed against the depreciated rolling stock of all railroads, was \$7,628,297.00, and that the depreciated value of the average number of units of rolling stock leased or owned by plaintiffs physically present in Missouri during the year 1964, after applying said forty-seven per cent (47%) factor was \$7,014,723.00. The assessed valuation of rolling stock as determined by the Commission in its original assessment (\$19,981,757.00) was grossly excessive and had no necessary or reasonable relation to the number of units or the aforesaid value of units physically present in Missouri. The Commission presented no evidence in support of its previously determined total assessment of \$31,298,939.00.

11. At the said hearing on June 23, 1965, the parties entered into a stipulation as to certain facts, a copy of

which stipulation is attached hereto and marked "Exhibit B".

Among other things it was stipulated that the Commission in arriving at the assessed value of rolling stock in this case for the year 1965 used the depreciated value of all rolling stock and movable property owned or leased by Norfolk and Western as of January 1, 1965, wherever situated, in the amount of \$513,309,877.00; that in this case as in all other railroad assessments the depreciated value was determined by taking the original cost of the equipment by year of acquisition and allowing five per cent (5%) depreciation per year but with a maximum allowable depreciation of seventy-five per cent (75%) of original cost; that in this case as in the case of all railroad assessments for the year 1965, a factor of forty-seven per cent (47%) was applied by the Commission resulting in this case in the figure of \$241,255,643.00; that the "track formula" (Sec. 151.060 (3)) was then applied in that 8.2824 per cent of all the main and branch line tracks everywhere which were leased, owned or controlled by Norfolk and Western was within Missouri and this percentage of the above value of the depreciated rolling stock was determined to be \$19,981,757.00 and was by the Commission stated to be the value of the rolling stock properly taxable in Missouri; that from the total value of the fixed property assessed in Missouri at \$12,177,597.00, which fixed property was owned by plaintiff Wabash and leased to plaintiff Norfolk and Western, and the above assessed value of said rolling stock, the sum of \$860,415.00 was deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts, and that as the result of the above method of assessment and computation, a total assessed valuation was made of \$31,298,939.00.

12. On July 6, 1965, the Commission delivered to plaintiffs in writing notice of its decision and that a final

assessment for 1965 against the property owned or leased by Norfolk and Western had been made in the amount of \$31,298,939.00, \$12,177,597.00 representing the assessment against fixed properties and \$19,981,757.00 representing the assessment against rolling stock, and from these two figures was deducted \$860,415.00 as an economic factor. In this proceeding plaintiffs do not challenge the amount of the assessment of fixed properties.

13. Plaintiffs state that they and each of them is aggrieved by this final decision of the Commission as to the assessment of rolling stock, and that they have exhausted all administrative remedies provided by law.

14. Plaintiffs state that in making its assessment of the rolling stock, the Commission erred in the following respects:

(a) That the assessment by the Commission of the rolling stock in the amount of \$19,981,757.00 was unlawful, invalid, void, arbitrary, unreasonable, grossly excessive, capricious, and discriminatory.

(b) That the method of making such assessment as applied to the facts in this case is in contravention of the Due Process Clause of the 14th Amendment to, and the Commerce Clause (article 1, Sec. 8) of, the Constitution of the United States and of the Due Process Provisions and Equal Protection Provisions of the Constitution of the State of Missouri.

(c) That the said assessment as made by the Commission was in excess of its statutory authority and jurisdiction.

(d) That the Commission unlawfully and erroneously included for assessment purposes properties leased or owned by Norfolk and Western with no tax situs in the State of Missouri, and which, because of the unique operations of Norfolk and Western, are habitually and regularly used outside the State of Missouri and which will never have a tax situs within Missouri.

(e) That the assessed valuation of the rolling stock, as made by the Commission, by applying the "track formula" against the depreciated, equalized value of all rolling stock owned or leased by Norfolk and Western, bears no necessary or reasonable relation to the number of units or the depreciated, equalized value of units of rolling stock physically located in Missouri or habitually and regularly used in Missouri.

(f) That the assessment as made by the Commission is not supported by competent and substantial evidence upon the whole record.

(g) That the Commission has failed to properly assess the properties owned by the plaintiff Wabash, which Wabash properties within Missouri would be subject to execution to satisfy the tax based on this invalid and unlawful assessment valuation which includes property with no taxable situs in Missouri and not owned by Wabash.

(h) That the Commission erred in failing to recognize that Wabash is a corporate entity separate and apart from Norfolk and Western and that since and after the date of the said lease by Wabash to Norfolk and Western there has been no substantial change in the operations of rolling stock on Wabash lines in Missouri nor has there been a significant change in the number of units of rolling stock on Wabash lines in Missouri.

(i) That in applying the "track formula" of Sec. 151.060(3) under the facts in this case, without further exercising its power to adjust and equalize, the Commission unreasonably and arbitrarily attributed to Missouri, for tax purposes, a grossly disproportionate amount of the total rolling stock owned and leased by plaintiff Norfolk and Western; the Commission disregarded the unique operations of Norfolk and Western and the fact that proportionately far heavier traffic and far more valuable equipment is located and regularly and habitually used outside the State of Missouri than is located and used in Missouri; the Commission disregarded the evidence of the depreciated value of the large amount of rolling stock of Norfolk and Western which, by its very nature and the

unique business demands of Norfolk and Western, never came into Missouri and which for the same reasons will never be used in Missouri, but which was erroneously included by the Commission in computing the assessed valuation of Norfolk and Western; the Commission disregarded the evidence that the ton miles of freight carried over a mile of Wabash track in Missouri in 1964 was only fifty-four per cent (54%) of the ton miles of freight carried over an average mile of all track owned, leased, or controlled by Norfolk and Western.

(j) That the Commission further erred in failing to recognize that Wabash, as owner, is responsible to the State of Missouri for the ad valorem tax for 1965 on its fixed properties in Missouri and a proper portion of its rolling stock, but rather the Commission has attempted to place the assessment against Norfolk and Western with the result that the attempted assessment includes property with no tax situs in Missouri.

(k) That the Commission erred in purporting to assess the ad valorem tax in this case against Norfolk and Western rather than against Wabash and has unlawfully and without legal justification interpreted Sections 151.010 and 151.020, R.S.Mo., apparently in the belief that such an interpretation permitted it to include for assessment purposes the value of rolling stock owned or leased by Norfolk and Western which was never physically in the State of Missouri on or prior to January 1, 1965, and which has never acquired a tax situs in the State of Missouri.

(l) That in using the "track formula" of Sec. 151.060(3) R.S.Mo., under the facts in this case without further exercising its power to adjust and equalize, the Commission has acted unreasonably, arbitrarily and in excess of its statutory authority, and in a manner which results in an assessment of rolling stock which is violative of the said Due Process and Commerce Clauses of the Constitution of the United States and the Due Process and Equal Protection Provisions of the Constitution of Missouri.

WHEREFORE, plaintiffs pray that this Court, after reviewing the Commission's order of final assessment, its findings of fact and conclusions of law, and the record as a whole, shall adjudge, order, and decree:

- (a) That the "track formula" set forth in Sec. 151.060(3) as used by the Commission in making its assessment of rolling stock and as applied to the facts of this case is unconstitutional and results in a violation of the Due Process Clause of the 14th Amendment to the United States Constitution, the Commerce Clause of the United States Constitution (Article 1, Sec. 8) by imposing an extreme and undue hardship on interstate commerce, and a violation of the Due Process and Equal Protection Clauses of the Constitution of Missouri.
- (b) That the application by the Commission of the said "track formula", Sec. 151.060(3), to the aggregate depreciated, equalized value of all of the rolling stock owned or leased by Norfolk and Western, wherever situate, and wherever used, without further adjustment as provided by law, is prohibited by the Due Process Clause of the 14th Amendment to, and the Commerce Clause, (Article 1, Sec. 8) of, the United States Constitution, and the Due Process Clause and Equal Protection Clause of the Constitution of Missouri.
- (c) That the assessed value of the rolling stock for tax purposes in Missouri must, as a matter of law, bear a reasonable and necessary relation to the equalized, depreciated value of the rolling stock actually, physically present in Missouri on January 1, 1965, or the equalized, depreciated value of the average number of units of rolling stock regularly and habitually used in Missouri, whereas the assessment in question is grossly in excess of the equalized, depreciated value of the rolling stock actually, physically present in Missouri on January 1, 1965, and grossly in excess of such value of the average number of units of rolling stock regularly and habitually in the State of Missouri, and therefore such assessment is contrary to the aforesaid provisions of the Constitutions of the United States and Missouri.

(d) That the said "track formula" provided for by Sec. 151.060(3) does not constitute the only factor to be used by the Commission in making an assessment of the rolling stock taxable in Missouri, but, rather, merely defines that portion of a railroad's rolling stock which is subject to the Commission's powers of assessment, equalization, and adjustment, and in fact situations such as in this case where an arbitrary application of the "track formula" results in an assessment grossly in excess of the depreciated, equalized value of rolling stock physically present in Missouri and generally and habitually used in Missouri, the Commission should exercise its discretion in accordance with the record before it and pursuant to its statutory power of adjustment in order to avoid a resulting assessment which does violence to the Due Process Clause and Commerce Clause of the Constitution of the United States and the Due Process and Equal Protection Clauses of the Constitution of Missouri.

(e) The mere execution of the said lease between Wabash and Norfolk and Western, viewed under a proper interpretation of Sec. 151.010 and Sec. 151.020, R.S.Mo., and the facts in this record, does not permit the State of Missouri to include for tax purposes the total rolling rock owned or leased by Norfolk and Western, but the correct method of assessment is one made against the Wabash distributable property in the same manner as used in prior years.

(f) That the case be remanded to the Commission with directions to redetermine the Missouri 1965 assessed valuation of the rolling stock, in accordance with the rulings of the Court and the record as a whole.

(g) Such further relief as may be just and proper.

* * * *

Judgment of the Circuit Court of Cole County, Missouri

Thereafter, on December 21, 1965, the Court again takes up and considers this cause, and, having considered the evidence in the record of this cause, having considered the oral arguments of counsel, and their briefs, and being

now fully advised in the premises, finds the issues in this case against the plaintiffs and for the defendants and enters Judgment, as follows:

JUDGMENT

Now on this 21st day of December, 1965, the Court having fully considered the pleadings, the evidence and the entire record before the State Tax Commission as embodied in the transcript of record, the briefs, exhibits and arguments of counsel, and being fully advised in the premises, the Court finds all issues in this case against the plaintiffs and for the defendants herein.

THEREFORE, IT IS BY THE COURT ORDERED, ADJUDGED and DECREED that the decision of the State Tax Commission of the State of Missouri, "In the matter of the 1965 ad valorem tax assessment of the NORFOLK and WESTERN RAILWAY COMPANY," be, and the same hereby is, affirmed.

FILED:
DECEMBER 21, 1965.

• • •

IN THE SUPREME COURT OF MISSOURI

Judgment

And Thereafter the following proceedings were had and entered of record in said cause on the 30th day of December, 1966, to-wit:

NORFOLK AND WESTERN RAILWAY COMPANY,
a Corporation, and WABASH RAILROAD COMPANY,
a Corporation, APPELLANTS,

51943 vs. Appeal from the Circuit Court of Cole County.

MISSOURI STATE TAX COMMISSION, HUNTER PHILLIPS,
HOWARD L. LOVE, J. RALPH HUTCHISON, Members of the
Missouri State Tax Commission, and J. R. TOWSON,
Secretary of the Missouri State Tax Commission,
RESPONDENTS.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution. (Opinion filed.)

And Thereafter on the 30th day of December, 1966, the opinion of Division No. One was filed, which opinion is in words and figures as follows:

Opinion**IN THE SUPREME COURT OF MISSOURI****DIVISION NUMBER ONE****SEPTEMBER SESSION, 1966****No. 51,943**

NORFOLK AND WESTERN RAILWAY COMPANY,
a Corporation, and WABASH RAILROAD COMPANY,
a Corporation, **APPELLANTS**,

MISSOURI STATE TAX COMMISSION, HUNTER PHILLIPS,
HOWARD L. LOVE, J. RALPH HUTCHISON, Members of the
Missouri State Tax Commission, and J. R. TOWSON,
Secretary of the Missouri State Tax Commission,
RESPONDENTS.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY**THE HONORABLE JAMES T. RILEY, *Judge***

Proceeding under Section 536.100, et seq., V.A.M.S., for judicial review of a final decision of the State Tax Commission of Missouri. The circuit court affirmed the decision, and the railroad's appeal involves construction of the revenue laws of the state.

Appellants Wabash and Norfolk and Western entered into a lease effective October 16, 1964, whereby N & W leased all of the rolling stock and roadbed owned by Wabash in Missouri and elsewhere. As part of the payment due under the lease, N & W is to pay all taxes on the demised property. Also effective October 16, 1964, were a merger of the New York, Chicago and St. Louis Railroad Company (Nickel Plate) with N & W and a lease of the rolling stock and roadbed of the Pittsburgh and

West Virginia Railway Company by N & W. Prior to the leases and merger Nickel Plate, P & WV, and N & W did not run into Missouri.

Appellants furnished statements required of all affected railroads by Section 151.020, V.A.M.S., "setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks, in each county, etc., * * *; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof." On June 2, 1965, N & W was notified that its assessment for 1965 taxes on such properties was \$31,298,939. The notice advised also that a hearing relative to the assessment would be held June 15, 1965, and "please be prepared to submit detailed information on leased equipment including copies of such leases and any other pertinent data." The hearing was recessed until June 23, 1965, at which time appellants offered evidence on various matters including the depreciated value of property in the name of Wabash alone, studies concerning rolling stock actually in Missouri, the nature of appellants' business including coal hauling in the eastern United States, and figures relating to locomotives and coal hoppers employed in the coal-hauling portion of appellants' business. Appellants' corporate status and the commission's mode of computation were stipulated.

The commission entered its Findings of Fact, Conclusions of Law and Decision:

"FINDINGS OF FACT

"The Petitioner, Norfolk and Western Railway Company, is incorporated under the laws of the Common-

wealth of Virginia with its principal office and place of business in Roanoke, Virginia; The Wabash Railroad Company is incorporated under the laws of Ohio with its principal offices and places of business in Wilmington, Delaware and Philadelphia, Pennsylvania. Norfolk and Western Railway Company owns no track or roadbed within Missouri but leases all of the track, roadbed, rolling stock and all other property owned by the Wabash Railroad Company in this State, pursuant to a lease dated March 1, 1961, as amended October 1, 1964, effective as of October 16, 1964. Petitioner owns and leases an extensive railway system which it operates in States other than the State of Missouri.

"Pursuant to the information submitted by Petitioner to the Commission on Form 1, on May 15, 1965, the State Tax Commission of Missouri, on June 2, 1965, placed a total assessed valuation of \$31,298,939 on Petitioner's property in Missouri for taxes for the year 1965.

"Said Assessment included an assessed value for roadbed in the amount of \$11,677,875; for buildings in the amount of \$499,722; and for rolling stock in the amount of \$19,981,757, less \$860,415, which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts.

"To arrive at assessed value of rolling stock taxable in the State of Missouri, the Commission determined the assessed value of the entire rolling stock of the Petitioner, wherever situated, for the year 1965, to be in the amount of \$513,309,877. This was arrived at as in all other railroad assessments made by the State Tax Commission of Missouri, by taking the original cost of the equipment by the year of acquisition and allowing five percent depreciation per year but with a maximum depreciation of Seventy-five percent of original cost. Thereafter, in this case, as in the case of all railroad assessments for the year 1965, a factor of forty-seven percent was applied.

by the State Tax Commission resulting, in this case in the figure of \$241,255,643. The track formula was then determined and it was found that 8.2824 percent of all of the main and branch line tracks owned or leased everywhere by Petitioner, were leased, owned, or controlled by Norfolk and Western in Missouri. This percentage of the above value of the depreciated rolling stock was determined to be \$19,981,757 and was by the Commission stated to be the value of the rolling stock properly taxable in Missouri. The figures used in this determination were furnished the Commission by Petitioner in Form 1, which was filed with the Commission.

"That from the total value of the fixed property, which includes the roadbed and buildings, assessed in Missouri at \$12,177,597 which property was owned by the Wabash Railroad Company and leased to Norfolk and Western, plus the above assessed value of the rolling stock and all other property, the sum of \$860,415 was deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts, and that as a result of the above method of assessment and computation, a total assessed valuation was made of \$31,298,939.

"No assessment has been made against Wabash Railroad Company for the property leased to Petitioner.

"The Petitioner, on June 15, 1965, filed a request for adjustment and equalization of assessment and for a hearing with respect thereto, and such hearing was granted and such rehearing heard on June 23, 1965, at the Offices of The State Tax Commission of Missouri, 501 Jefferson Building, City of Jefferson, Cole County, Missouri, and the Commission then considered the assessment placed on said property by it as of January 1, 1965. The Railway and Commission agreed that the hearing held on June 23 constituted an exhaustion of administrative remedies of the Petitioner.

"At said hearing, the Petitioner introduced evidence consisting of testimony supplemented by exhibits for the purpose of showing assessed valuation placed by the Commission on the rolling stock of Petitioner was excessive and resulted in an unjustified discrimination against Petitioner in violation of the Constitutions, both of the United States and of the State of Missouri. The Petitioner did not challenge the amount of the assessment on its fixed properties.

"The State Tax Commission of Missouri has adopted uniform procedures and methods to determine the true value in money of the railroad property for assessment purposes within the State of Missouri. Such procedures and methods are designed to value all railroad property within the State of Missouri uniformly and equally with all other property within the State of Missouri. Such procedure and methods were used in assessing and valuing the petitioner's property as of January 1, 1965. The evidence failed to disclose that the property of the Petitioner was ever placed on sale in the open market.

"Utility company valuations are made by the State Tax Commission as to the distributable property and rolling stock of railroads while other properties are assessed locally by county and township assessors. The relative values of sales ratio assessments and utility assessments are separate and distinct in that there are two methods used in arriving at values, and there is no basis for comparison between the valuation of the sale of a farm or a home based on revenue stamps attached to the deed and the valuation of utility property which is not being sold frequently, or ever. There is no similarity in these two types of property or in the method of arriving at the valuations for assessing purposes thereof."

"CONCLUSIONS OF LAW

"All railroads now constructed, in the course of construction, or which shall hereafter be constructed in this State and all property, tangible personal property, and intangible personal property owned, hired or leased by any railroad company or corporation in this State shall be subject to taxation, and taxes assessed on real property, and tangible personal property shall be assessed in the manner set forth in Chapter 151, R.S.Mo.

"Property shall be assessed for tax purposes at its true value in money or such percentage of its true value in money as may be fixed by law. There is no such thing as an absolute true value of property. The values mentioned in the Statutes are the valuations of officials whose duty it is to make them. Property, including railroad property, is not a commodity which has a fixed market value at a given period. The value is determined always by the estimate of the party who values it; all presumptions will favor the correctness of the valuations of the officials whose duty it is to make them; and their good faith and the validity of their acts is presumed. The State Tax Commission of Missouri is the sole judge of the credibility of witnesses appearing before it.

"Every owner, lessor or party having an interest in property shall have the right to appeal and to a rehearing under rules prescribed by the State Tax Commission. The said Commission shall investigate all such appeals or motions for rehearing or protests of assessments and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious.

"In assessing, adjusting and equalizing a railroad property for any year or years, the State Tax Commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and

judgment by the testimony which may be adduced, further than to give to it such weight as the Commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this State and into another state in which a tax is levied and paid on the rolling stock of such road, then the said Commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company.

"In determining the total length of the road of railroad company for the purpose of determining its tax assessment, the Commission is required to take into consideration the track which is operated partially under the control of the railroad under trackage agreements as well as that which is owned by the railroad, even though such trackage agreement does not provide for the exclusive use by the railroad of the track in order to require it to be taken into consideration.

"The Assessment of the rolling stock of the Petitioner was determined in accordance with Chapter 151, R.S.Mo., particularly Section 151.060-3, in that said assessment was determined by taking that percentage of the total value of all the rolling stock of the Petitioner that the number of miles of the trackage of Petitioner in this State bears to the total length of the road as owned or controlled by Petitioner wherever situated.

"Section 151:060-3 R.S.Mo., which prescribes the formula by which the Commission determined the assessed valuation on Petitioner's rolling stock in the State of Missouri, provides a fair and reasonable method to determine that amount of rolling stock of any railroad which extends beyond the limits of the State which may be taxed by this State and does not constitute a violation of any of the

rights or privileges guaranteed by the Constitution of Missouri or the Constitution of the United States.

"This formula, as used in conjunction with the determination of value using depreciation and a forty-seven percent equalization factor together with the deduction of the economic factor as set out in the Findings of Fact, were used uniformly by the Commission to arrive at assessments of the rolling stock of the various railroads in this State, and to apply this formula to some railroads and not to others would be arbitrary and discriminatory.

"The evidence adduced by the Petitioner does not show that the valuation placed upon the rolling stock of Petitioner was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of Petitioner, nor does the evidence adduced by the Petitioner show that in applying the formula herein indicated that the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner.

"DECISION

"The Commission, after giving due consideration and study to the records, evidence and data submitted on behalf of the Commission and studying the transcript of the proceedings before it, finds that the valuation of the Petitioner's property for the year 1965 should be as follows: Thirty-One Million Two Hundred Ninety-Eight Thousand Nine Hundred Thirty-Nine Dollars, (\$31,298,939)."

Upon appeal to the circuit court the decision was affirmed without additional findings of fact or conclusions of law and, on this appeal, appellants "do not challenge the amount of the assessment of the fixed properties located in Missouri, but do challenge the manner in which assessment was made of the rolling stock, the amount of rolling stock apportioned to Missouri and the resulting excessive assessment of rolling stock." Appellants also do not question the total depreciated valuation of the en-

tire rolling stock of N & W, \$513,309,877, the method of depreciation, the 47 percent adjustment and equalization factor, and the \$860,415 economic factor.

Appellants' contention is stated: "I. The Trial Court Erred in Affirming the Decision of the State Tax Commission, Its Findings of Fact and Conclusions of Law, and Its Assessment of Rolling Stock Against Norfolk and Western Railway, Because Such Assessment Contravenes the Due Process Clause (Section 1) of the Fourteenth Amendment to and the Commerce Clause (Article I, Section 8) of the Constitution of the United States and the Due Process Clause of the Constitution of the State of Missouri (Article I, Section 10), in That:

"(A) The Track Formula (Sec. 151.060(3)) Was Arbitrarily and Erroneously Applied by the Commission As the Sole Method of Apportioning Rolling Stock to Missouri, Inasmuch As the Uncontradicted Evidence Established (1) a Grossly Uneven Distribution of N & W Rolling Stock Throughout Its Operations, and (2) That the Percentage of All Units, Located in Missouri At Any Given Time, Varied Substantially from the Percentage in Missouri of All Miles of Road of the Railroad.

"(B) The Tax Commission, by Its Use of the Track Formula, Alone, under the Facts of This Case, Apportioned to Missouri a Grossly Excessive Amount of Rolling Stock, with No Fair, Necessary, or Reasonable Relation to the Units of Rolling Stock Actually Present in Missouri on January 1, 1965, or to the Average Number of Units Regularly and Habitually Used in Missouri During 1964, or to the Value of Such Units.

"(C) The Tax Commission, by the Invalid and Improper Use of the Track Formula, Alone, under the Facts of This Case, Apportioned to Missouri a Grossly Excessive Amount of Rolling Stock, and Thereby Included in the Assessment Property with No Tax Situs in Missouri.

"II. * * * Because the Decision of the Commission, its Findings of Fact, and Conclusions of Law are not Supported by Competent and Substantial Evidence Upon the Whole Record."

The State Tax Commission of Missouri has the exclusive power of original assessment of railroads, railroad cars, and rolling stock, Section 138.420(1), V.A.M.S.; "all real property, tangible personal property, and intangible personal property, owned, hired or leased, by any railroad company or corporation in this state, shall be subject to taxation," Section 151.010, V.A.M.S.; and "In assessing, adjusting and equalizing any railroad property * * * the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company," Section 151.060(3), V.A.M.S.

Appellants recognize that a state may impose an apportioned tax on the value of the rolling stock of a non-domiciliary railroad in the manner contemplated by the Missouri statutes, "that precision may not always be reached in taxing property of a foreign corporation which moves in interstate commerce," and they "make no claim that the track formula is per se invalid," thus limiting the question as to whether Missouri's method, Section 151.060(3), valid on its face, meets the test of reasonable

or fair and workable apportionment in its application to N & W in this case. *General Motor Corp. v. District of Columbia*, 380 U.S. 553, 562; *Norfolk and W. R. Co. v. North Carolina*, 297 U.S. 682, 685; *St. Louis Southwestern Ry. Co. v. State Tax Commission of Mo.*, Mo., 319 S.W. 2d 559, 561[1].

It has been repeatedly recognized in connection with statutes similar to Section 151.060(3) that an appropriate and constitutional method of assessment of an interstate railroad is to determine the value of the entire system "as a homogeneous unit representing a single profit-earning business," 51 Am. Jur., Taxation, § 877, and then to assign a percentage of that valuation to the taxing state according to some fair and reasonable method of apportionment. 84 C.J.S., Taxation, § 426(c). The courts have long considered that the valuation of the entire rolling stock of railroads under a unit method of assessment and the apportionment of that value to the taxing state in the proportion the number of miles of railroad operated in the taxing state bears to the total mileage of railroad in the entire system, is an equitable and eminently fair method of arriving at an assessment of rolling stock. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 26; *Pittsburgh etc. R. Co. v. Backus*, 154 U.S. 421, 431; *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174. The theory underlying such method of assessment is that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole and may, therefore, be taxed according to its value "as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system." *Pullman Co. v. Richardson*, 261 U.S. 330, 338. See also Judson on Taxation, 2d Ed., §§ 258-268, discussing development of the unit method and mileage apportionment or "rule of

entirety" as an acceptable method of valuation of interstate railroads; 2 Cooley, *Taxation*, 4th Ed., § 805, on the philosophy of taxation of railroad companies by mileage apportionment; and *St. Louis Southwestern Ry. Co. v. State Tax Commission of Mo.*, *supra*, 319 S.W. 2d 1.c. 562 [4, 5], describing the theory of Section 151.060 as being "that the rolling stock is substantially evenly divided throughout the railroad's entire system, and the percentage of all units which are located in Missouri at any given time, or for any given period of time, will be substantially the same as the percentage of all the miles of road of the railroad located in Missouri." And it has been held that such methods are not an "attempt to tax property having a situs outside of the State, but only to place a just value on that within." *Adams Express Co. v. Ohio*, 165 U.S. 194, 227.

Of course, even if the validity of such methods be conceded, the results, to be valid, must be free of excessiveness and discrimination. Caution in application of such methods has been suggested in many cases, for example, *Braniff Airways v. Nebraska Board*, 347 U.S. 590, 603: "Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem." *Fargo v. Hart*, 193 U.S. 490, 500: "So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized * * * that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. * * * The same principle applies to personal property which the State would not have the right to tax directly." *Pittsburgh etc. R. Co. v. Backus*, *supra*, 154 U.S. 1.c. 431: " * * * there may be exceptional cases, * * * as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in

such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock." See also *Wallace v. Hines*, 253 U.S. 66, *Rowley v. Chicago & N.W. R. Co.*, 293 U.S. 102, *Union Tank Line v. Wright*, 249 U.S. 275, *Southern Ry. Co. v. Kentucky*, 274 U.S. 76, *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, *K.C. Ft. S. & M.R. Co. v. King*, 6 Cir., 120 F. 614, refusing application of mileage apportionment to accomplish obvious arbitrary or excessive results.

The stipulation and the findings and conclusions show that the commission did assess, adjust, and equalize, as required by statute, Section 151.060, and in keeping with a reasonable exercise of the philosophy of the unit method and mileage apportionment there provided. The commission ascertained the depreciated value of the rolling stock of N & W as of January 1, 1965, from the return filed by N & W pursuant to Section 151.020. That value was obtained by application of an allowable depreciation of five percent per year with a maximum of 75 percent against the original cost. To the resulting figure, \$513,309,877, the factor of 47 percent, used to equalize all railroad property in Missouri, was applied to equalize the total or entire value of N & W rolling stock with the valuation of other properties in Missouri. A percentage was then obtained by determining the proportion the mileage in Missouri, 627.61, bore to the total mileage in the N & W system, 7577.55. The proportion thus obtained, 8.282 percent, was then applied to the equalized value of N & W rolling stock to determine the amount of N & W properly subject to taxation in Missouri. This amount was further adjusted by deduction of an economic factor of \$860,415 from the assessed valuation of fixed and movable property of N & W in Missouri and resulted ultimately in the valuation of N & W rolling stock of \$19,981,757. The total process

thus described constitutes the assessment of N & W, all as required and provided by Section 151.060, and such assessment was made in the same manner as for all other railroads in Missouri.

Appellants introduced evidence before the commission to show that the *average* depreciated, equalized value of rolling stock regularly used in Missouri in 1964 and on January 1, 1965, was \$7,014,723 and that, while 8.2824 percent of all N & W miles were in Missouri, only 2.71 percent of all N & W units having 3.16 percent of the total depreciated, equalized value of N & W rolling stock was in Missouri on January 1, 1965. Such evidence came from exhibits showing the employment by N & W of most of its coal-hauling equipment in hauling coal from Virginia, West Virginia, and Kentucky to the eastern ports and manufacturing centers and to the Great Lakes region. Similar exhibits showed that part of the system originally operated as Wabash to be utilized mainly for hauling general merchandise between Missouri and Iowa and the east, with but a small portion of coal hauling in that area. Exhibits also showed the depreciated values of equipment belonging to the individual railroads prior to the leases and merger which put together the N & W system. These, of course, showed that the bulk of the coal-hauling equipment now in the total system came from those roads which originally served the coal-producing and demanding areas prior to the merger of all the roads into a more comprehensive and diversified system which now employs its entire rolling stock to meet the demands of a larger system serving a greater area. Other exhibits showed that the leases and merger brought about no increase in the average amount of Wabash, N & W, Nickel Plate, and P. & W.V. cars in Missouri.

Use of the average number of units in the state has been held to be a fair method of assessment of interstate rolling stock, *Central R. Co. v. Pennsylvania*, 370 U.S. 607,

Marye v. B. & O. R. Co., 127 U.S. 117, *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70; however, figures thus obtained are not conclusive on whether the N & W assessment for 1965 based on mileage apportionment is unconstitutional, arbitrary, or grossly excessive. Nor are the figures of 2.71 percent of the total rolling stock constituting 3.16 percent of the total value conclusive on the matters of substantially even division of rolling stock and mileage throughout the system because, quite obviously, they do not recognize any justified enhanced or augmented value to the portion actually in Missouri brought about by being merged into the entire N & W system. See *Union Tank Line Co. v. Wright*, *supra*, 249 U.S. 1.c. 282: "While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system.'" In *Pittsburgh etc. Co. v. Backus*, *supra*, the assessed railroad was created between April 1, 1890, and April 12, 1891, by merger of several existing roads. Prior to the merger, the Indiana portion of the merged property had been assessed at \$8,538,053, and the postmerger assessment was \$22,666,470, approximately the same increase as that involved here. Complaint of unconstitutional valuation was attempted to be supported in much the same manner as here and was answered: "Still, it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be adjudged illegal." 154 U.S. 1.c. 432.

Much of appellants' argument is based on comparisons of the Missouri portion of the original Wabash system to the total Wabash system prior to the lease to N & W, but surely the parties to the leases and merger thought that

the merged system would be more valuable than its component parts. Otherwise, common sense would suggest they remain as separate, smaller, nonintegrated entities, and it makes equally good sense for the coal-hauling equipment to be continued in the area where it is most needed. Consideration of the total value of N & W rolling stock, including its coal-hopper cars and coal-region diesel engines, in arriving at the valuation of that part of the N & W system in Missouri is not like the situations presented, for example, in *Wallace v. Hines, supra*, where the cost of building railroads in neighboring mountain states was out of proportion to the cost of construction in North Dakota, the taxing state; in *Union Tank Line Co. v. Wright, supra*, where the number of cars of a New Jersey tank-line company claimed by Georgia bore no relation to the percentage Georgia's railroads bore to all railroads in the country; in *Fargo v. Hart, supra*, where bonds of an express company in New York bore no relation to the valuation of the company's express business in Indiana; and in *Pittsburgh etc. R. Co. v. Backus, supra*, recognizing the exceptional case of terminals of enormous value in one city out of all proportion to any other distance on the line, and the use in certain localities of a particular kind of business requiring an extra amount of rolling stock for that part of the line only. An example of the last suggestion might be the employment in a mining operation of narrow gauge rails and cars which could not be used throughout the entire system.

Appellants' figures also showed that the depreciated value of rolling stock previously owned by Wabash alone would be \$82,456,813, as compared to \$241,255,643 for the entire merged system. They concede that if, on the 1965 return, the commission had applied the formula to the Wabash part of the system and properties alone, the assessment would have amounted to \$10,103,340. Certainly, no unconstitutional disproportion is revealed in an assessment of \$19,981,757 against a total valuation of

\$241,255,643, when compared to \$10,103,340 assessed against \$82,456,813, and such proportion in no way approaches the differential of 600 percent criticized in *Union Tank Line Co. v. Wright, supra*. See also *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, where an assessment of \$23,996,604.14 was held not excessive in comparison to the railroad's figure of \$16,021,296.

The decision of the state tax commission must, of course, be supported by competent and substantial evidence upon the whole record. *Drey v. State Tax Commission, Mo.*, 345 S.W. 2d 228. In this case the decision receives ample support from those items taken directly from appellants' statutory return of properties used in connection with mileages both within and without Missouri, "habitually, constantly and regularly used as an essential part of Norfolk and Western Railway Company within the meaning of Section 151.060." The evidence was also such as to give the commission substantial knowledge and information on the scope and type of operation conducted by N & W as well as the manner in which the operation measured by the Missouri mileage fits into the entire N & W scheme. Under the authorities that is sufficient because "(t)here is no such thing in assessments as an absolute 'true value,' and an assessment is, at best, a mere estimate; a presumption exists that the assessed valuation is correct, and the courts have no right to substitute their judgments, as such, for the values fixed by the assessor or by reviewing boards * * * and a taxpayer has the burden of establishing a discrimination." *Cupples Hesse v. State Tax Commission, Mo.*, 329 S.W. 2d 696, 700[3-6]. Such presumption is rebuttable, of course, *Koplar v. State Tax Commission, Mo.*, 321 S.W. 2d 686, 693[3], but it is not sufficient to assert that use of the track formula alone could well result in a "figure approximating the value of the property actually in the state" without demonstrating that or similar situation to be the case. The commission noted in its decision its prerogative of judging credibility of witnesses,

and it was free to weigh, determine relevancy, and disbelieve appellants' evidence on the issues presented. *May Dept. Stores Co. v. State Tax Commission*, Mo., 308 S.W. 2d 748, 761[16]. It is not necessary to analyze further all the evidence or to point out all the permissible inferences, it being sufficient to say that a formula alone was not the only item available to the commission's consideration. "The noted evidence and its reasonably permissible inferences establishes the presence of other factors and, in short, substantially supports the order and finding of the commission." *State v. State Tax Commission*, Mo., 384 S.W. 2d 565, 568[7].

Judgment affirmed.

ANDREW JACKSON HIGGINS, *Commissioner.*

HOUSER, C., not participating.

WELBORN, C., concurs.

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court.

HENLEY, HYDE, J. J., STORCKMAN, Alt. J., concur.

HOLMAN, P. J., not sitting.

**APPELLANTS' EXHIBITS BEFORE THE MISSOURI STATE
TAX COMMISSION**

Exhibit 5

**WABASH, NORFOLK AND WESTERN, NICKEL
PLATE AND P&WV CARS ON LINE IN
STATE OF MISSOURI**

Date	Number of Cars on Line in Missouri
February 1, 1964	1,908
March 1, 1964	2,187
April 1, 1964	1,874
May 1, 1964	1,843
June 1, 1964	2,143
July 1, 1964	2,446
August 1, 1964	2,159
September 1, 1964	2,487
October 1, 1964	2,336
November 1, 1964	1,967
December 1, 1964	1,873
January 1, 1965	2,213
Average Number of Cars on Line for 12-month period ending Jan. 1, 1965	2,120
February 1, 1965	1,717
March 1, 1965	2,022
April 1, 1965	1,913
Average Number of Cars on Line 1st quarter 1965	1,887
Average Number of Cars on Line 1st quarter 1964	1,989

Exhibit 6

ASSOCIATION OF AMERICAN RAILROADS
OPERATIONS AND MAINTENANCE DEPARTMENT
CAR SERVICE DIVISION
TRANSPORTATION BUILDING
WASHINGTON, D. C. 20006

June 8, 1965

CORRECTED

SPECIAL CAR ORDER NO. C-411—REVISED

To: Transportation Officers, All Railroad and Terminal Switch Lines.

EFFECTIVE: June 12, 1965, and continuing until further notice.

APPLICATION: To hopper cars of C&O, L&N-NC&STL and N&W-VGN-NKP-PWV-WAB ownerships developing empty in states east of the Mississippi River and west of the six New England states.

ORDER: Hopper cars of above ownerships developing in the designated areas must be excluded from all loading and returned empty to home lines. When used for train lot shipments of coal (unit trains) from owners, cars must be returned via reverse of loaded route as directed in Special Car Order C-526.

EXCEPTION: Cars of ownerships covered by this order may be used by other than owners for loading only when authorized by the Car Service Division or by owners. The Car Service Division must be advised by owners of such arrangements.

NOTE: Cars of foreign marks developing on roads named in this order may be used only for loading to or via owners' rails or for other loading when authorized by the Car Service Division or by owners. The Car Service Division must be advised by owners of any authorization for such use of their cars.

Please acknowledge.

Very truly yours,

E. P. MILLER

Lists: CS-1, 1A, 1B, DMs, CSAs.

Disregard stencil 1153 if received. This stencil contains a minor correction in the EXCEPTION.

Exhibit 9

**LOCOMOTIVES OWNED BY NORFOLK
AND WESTERN**
**(EXCLUSIVE OF NEW YORK, CHICAGO &
ST. LOUIS (NICKEL PLATE))**

AS OF JANUARY 1, 1965

Year of Acquisition	Units	Original Cost	Depreciated Value *
1954	28	\$ 5,839,416	\$ 2,627,737
1955	24	3,976,927	1,988,464
1956	49	8,815,925	4,848,759
1957	128	25,179,674	15,107,804
1958	78	15,208,784	9,885,710
1959	202	36,315,508	25,420,856
1960	16	3,100,096	2,325,072
1961	30	5,862,036	4,689,629
1962	50	10,803,212	9,182,730
1963	15	3,279,210	2,951,289
1964	65	9,648,814	9,166,373
TOTAL	685	\$128,029,602	\$88,194,423

* Depreciated according to Missouri State Tax Commission rates.

Exhibit 11

**LOCOMOTIVES FORMERLY OWNED BY NEW YORK,
CHICAGO & ST. LOUIS (NICKEL PLATE) AND
NOW OWNED BY NORFOLK AND WESTERN**

AS OF JANUARY 1, 1965

Year of Acquisition	Units	Original Cost	Depreciation Value *
1950 and Prior	56	\$ 5,143,433	\$ 1,285,858
1951	35	3,897,978	1,169,393
1952	26	2,530,854	885,799
1953	49	6,604,696	2,641,878
1954	23	3,401,310	1,530,590
1955	38	6,223,915	3,111,958
1956	27	4,386,712	2,412,692
1957	36	7,101,545	4,260,927
1958	40	6,447,674	4,190,988
1959	39	6,890,831	4,823,582
1960	15	2,635,382	1,976,537
1961	—	—	—
1962	21	3,967,360	3,372,256
1963	—	—	—
1964	2	383,623	364,442
Total	407	\$59,615,313	\$32,026,900

* Depreciated according to Missouri State Tax Commission rates.

Exhibit 12

HOPPER CARS OWNED BY NORFOLK AND
WESTERN AS OF JAN. 1, 1965

(EXCLUDING THOSE FORMERLY OWNED BY
NEW YORK, CHICAGO & ST. LOUIS
(NICKEL PLATE))

COAL HOPPER CARS

Year of Acquisition	Units	Original Cost	Depreciation Value*
1950 and Prior	21,428	\$ 60,152,727.28	\$ 15,038,181.82
1951	2,522	12,523,270.00	3,756,981.00
1952	1,907	9,822,221.00	3,437,777.35
1953	1,920	10,544,735.45	4,217,894.18
1954	None	—	—
1955	74	482,647.24	241,323.62
1956	4,641	33,867,497.02	18,627,123.36
1957	5,889	46,176,487.57	27,705,892.54
1958	2,402	19,314,661.36	12,554,529.88
1959	1,532	12,294,493.00	8,606,145.10
1960	2,664	19,035,495.66	14,276,621.75
1961	1,254	13,204,971.00	10,563,976.80
1962	1,863	18,774,671.20	15,958,470.52
1963	4,234	35,593,418.76	32,034,076.88
1964	6,325	47,940,054.50	45,543,051.78
	58,655	\$339,727,351.04	\$212,562,046.58

* Depreciated in accordance with Missouri State Tax Commission rates.

Exhibit 13

LOCATION OF COAL (OPEN) HOPPER CARS

	Wabash Hopper Cars on Wabash Lines	NKP Hopper Cars on NKP Lines	Norfolk and Western Hopper Cars on Lines of Norfolk and Western other than Wabash and NKP
Jan. 1, 1963	572	4,220	45,542
Feb. 1, 1963	682	4,493	44,486
March 1, 1963	660	4,209	43,716
April 1, 1963	632	3,870	43,668
May 1, 1963	525	3,261	39,715
June 1, 1963	550	2,480	37,680
July 1, 1963	564	2,263	38,115
August 1, 1963	600	2,886	41,201
Sept. 1, 1963	621	2,665	41,067
Oct. 1, 1963	623	2,667	40,660
Nov. 1, 1963	618	2,817	41,869
Dec. 1, 1963	622	2,829	44,911
Jan. 1, 1964	621	2,993	47,502
Feb. 1, 1964	625	3,488	46,850
March 1, 1964	650	3,041	47,694
April 1, 1964	632	3,481	46,369
May 1, 1964	636	2,984	45,102
June 1, 1964	634	2,154	39,417
July 1, 1964	641	1,924	42,830
August 1, 1964	653	2,586	45,356
Sept. 1, 1964	657	2,330	40,706
Oct. 1, 1964	656	2,042	40,765
Nov. 1, 1964	672 *	2,941 *	38,755 *
Dec. 1, 1964	675 *	3,301 *	41,269 *
Jan. 1, 1965	672 *	3,336 *	45,698 *

* Wabash, Norfolk and Western and NKP cars are included for months of Nov. 1, 1964, Dec. 1, 1964 and Jan. 1, 1965, only, and are not included in the other months.

NKP — New York, Chicago & St. Louis Railroad (Nickel Plate).

Exhibit 14

NORFOLK AND WESTERN HOPPER CARS IN
 MISSOURI ON LINE AND OFF LINE ON
 DEC. 1, 1964 AND JAN. 1, 1965.

(excluding Wabash and former New York, Chicago &
 St. Louis (Nickel Plate))

HOPPER CARS — OPEN TOP — AS OF DEC. 1, 1964

Year of Acquisition	Units	Original Cost	Depreciated Value *
1950 and Prior	74	\$225,584	\$ 56,396
1951	16	79,123	23,737
1952	8	41,697	14,594
1953	5	27,375	10,950
1954	—	—	—
1955	—	—	—
1956	17	124,571	68,514
1957	14	108,909	65,345
1958	8	65,393	42,505
1959	3	30,769	21,538
1960	7	58,582	43,937
1961	2	20,898	16,718
1962	6	63,086	53,623
1963	4	12,422	11,180
1964	1	10,431	9,909
	165	\$868,840	\$438,946

* Depreciated in accordance with Missouri State Tax Commission rates.

Exhibit 14 (Continued)**HOPPER CARS — OPEN TOP — AS OF JAN. 1, 1965**

Year of Acquisition	Units	Original Cost	Depreciated Value *
1950 and Prior	76	\$221,684	\$ 55,421
1951	9	44,112	13,234
1952	2	10,329	3,615
1953	4	32,775	13,110
1954	—	—	—
1955	—	—	—
1956	8	99,070	54,489
1957	16	126,164	75,698
1958	18	145,848	94,801
1959	2	16,094	11,266
1960	4	27,208	20,406
1961	2	21,126	16,901
1962	2	20,905	17,769
1963	8	74,725	67,253
1964	4	9,196	8,736
	155	\$849,236	\$452,699

* Depreciated in accordance with Missouri State Tax Commission rates.

Exhibit 17

COAL SHIPMENTS BY NORFOLK AND WESTERN
 ORIGINATING IN WEST VIRGINIA, VIRGINIA,
 KENTUCKY AND OHIO, SHOWING DESTINATION
 BY AREAS AND STATES

Year 1964 (in tons)

Destination	
Tidewater	24,868,281
Lakes Docks	12,763,787
River Docks	6,255,395
All-Rail	31,045,537
Total	74,933,000
Alabama	612,285
California	31,747) equals .0026 of
Colorado	168,242) total tonnage
Connecticut	736
Delaware	36,542
D. C.	280,440
Florida	292
Georgia	25,578
Illinois	5,241,976
Indiana	622,392
Iowa	29,538
Maine	205
Maryland	746,241
Massachusetts	22,858
Michigan	1,911,263
Minnesota	2,518
New Hampshire	4,186
New Jersey	12,877
New York	381,487
North Carolina	4,621,234
Ohio	5,931,507
Pennsylvania	195,673
Rhode Is.	2,999
South Carolina	632,483
Tennessee	247,998
Vermont	3,176
Virginia	8,920,191
West Va.	166,461
Wisconsin	121,371
Canada	69,468
Unaccounted for	1,523

Exhibit 18

**OPEN TOP HOPPER CARS FORMERLY OWNED
AND LEASED BY NEW YORK, CHICAGO &
ST. LOUIS (NICKEL PLATE) AND NOW OWNED
OR LEASED BY NORFOLK AND WESTERN
AS OF JAN. 1, 1965**

HOPPER CARS — OPEN TOP

Year Acquired	No. of Units	Original Cost	Depreciated Value *
1950 and Prior	4,834	\$15,887,198	\$3,971,800
1964	500	5,505,233	5,229,971
TOTAL	5,334	\$21,392,431	\$9,201,771

* Depreciated according to Missouri State Tax Commission rates.

Exhibit 19

COAL HOPPER CARS FORMERLY OWNED AND
LEASED BY NEW YORK, CHICAGO & ST. LOUIS
(NICKEL PLATE) AND NOW OWNED BY
NORFOLK AND WESTERN, AND WHICH WERE
IN MISSOURI ON LINE AND OFF LINE ON
DEC. 1, 1964 AND JAN. 1, 1965

COAL HOPPER CARS — AS OF DEC. 1, 1964

Year of Acquisition	Units	Original Cost	Depreciated Value *
1950 and Prior	18	\$60,935	\$15,234
1964	3	33,960	32,262
	21	\$94,895	\$47,496

COAL HOPPER CARS — AS OF JAN. 1, 1965

Year of Acquisition	Units	Original Cost	Depreciated Value *
1950 and Prior	6	\$19,397	\$ 4,849
1964	2	14,801	14,060
	8	\$34,198	\$18,909

* Depreciated in accordance with Missouri State Tax Commission rates.

Exhibit 23

RECAP OF DEPRECIATED VALUES OF ROLLING STOCK SHOWN ON EXHIBITS 9, 11, 12, 18, 20, 21, 22

Depreciated value of locomotives owned by Norfolk and Western as of 1/1/65	\$ 88,194,423
Depreciated value of locomotives formerly owned by Nickel Plate RR as of 1/1/65	32,026,900
Depreciated value of Norfolk and Western hopper cars as of 1/1/65	212,562,046
Depreciated value of hopper cars formerly owned and leased by Nickel Plate RR as of 1/1/65	9,201,771
Depreciated value of Norfolk and Western work equipment as of 1/1/65	2,281,810
Depreciated value of work equipment formerly owned by Nickel Plate RR as of 1/1/65	713,332
Depreciated value of Norfolk and Western passenger equipment as of 1/1/65	1,290,026
	<hr/>
	\$346,270,308
Less:	
Estimated depreciated value of daily average number of Norfolk and Western hopper cars which might have been in Missouri during 1964	597,960
Estimated depreciated value of daily average number of former Nickel Plate hopper cars which might have been in Missouri during 1964	36,225
	<hr/>
	634,185
TOTAL	\$345,636,123
Depreciated value of rolling stock used in assessment	\$513,309,877

Exhibit 24

Depreciated Value of all Rolling Stock used, owned or leased by Norfolk and Western	\$513,309,877
Allocation of value to Missouri in proportion to miles of road owned, leased or controlled in Missouri to all other road leased, owned or controlled by Norfolk and Western $627.61 / 7,577.55 =$	
$8.2824 \times 513,309,879 =$	\$ 42,514,377
Ton Miles of freight handled for each mile of Norfolk and Western's 7,577.55 road miles in the year 1964	6,036,000 per mile
Ton Miles handled in Missouri for each mile of road in Missouri =	3,262,000 per mile
Percentage of ton miles carried in Missouri of the average per mile of all the miles of road owned, leased or controlled by Norfolk and Western	54.04%
$54.04 \times \$42,514,377 =$	\$ 22,974,769
47% of \$22,974,769 =	\$ 10,798,141

TOTAL ROLLING STOCK OWNED OR LEASED BY NORFOLK & WESTERN RY. CO. IN STATE OF MISSOURI ON JANUARY 1, 1955

Year of Acquisition		1950 and Prior	1951	1952	1953	1954	1955
<i>Freight Cars</i>							
Leased from Wabash R.R. Co.	Cost	\$ 3,006,049	\$ 378,258	\$ 265,498	\$ 526,731	\$ 250,860	\$ 170,189
	Units	968	67	41	68	30	21
Former N.K.P. R.R. Co.	Cost	\$ 674,346	\$ 6,753				\$ 27,171
	Units	204	1				3
Former P. & W. V. R.R. Co.	Cost	\$ 20,775					
	Units	5					
N. & W. Ry. Co.	Cost	\$ 691,179	\$ 110,844	\$ 109,834	\$ 213,139	\$ 61,188	\$ 94,277
	Units	237	22	20	37	14	13
	Total Cost	\$ 4,392,349	\$ 495,855	\$ 375,332	\$ 739,870	\$ 312,048	\$ 291,637
	Units	1,414	90	61	105	44	37
Condition Per Cent		25	30	35	40	45	50
Depreciated Value		\$ 1,098,087	\$ 148,757	\$ 131,366	\$ 295,948	\$ 140,422	\$ 145,819
<i>Diesel Locomotives</i>							
Leased from Wabash R.R. Co.	Cost	\$ 4,603,808	\$ 2,744,230	\$ 1,190,823	\$ 981,951	\$ 512,359	
	Units	33	18	8	8	3	
Condition Per Cent		25	30	35	40	45	
Depreciated Value		\$ 1,150,952	\$ 823,269	\$ 416,788	\$ 392,780	\$ 230,562	
<i>Work Equipment</i>							
Leased from Wabash R.R. Co.	Cost	\$ 276,486		\$ 4,902	\$ 8,679	\$ 1,369	\$ 1,402
	Units	77		3	3	1	1
Condition Per Cent		25		35	40	45	50
Depreciated Value		\$ 69,122		\$ 1,716	\$ 3,472	\$ 616	\$ 701
<i>Passenger Train Cars</i>							
Leased from Wabash R.R. Co.	Cost	\$ 2,414,032		\$ 256,700			
	Units	37		1			
Condition Per Cent		25		35			
Depreciated Value		\$ 603,508		\$ 89,845			
<i>Pullman Cars</i>							
Leased from Wabash R.R. Co.	None						
<i>Grand Total</i>							
	Cost	\$11,686,675	\$3,240,085	\$1,827,757	\$1,730,500	\$ 825,776	\$ 293,039
	Units	1,561	108	73	116	48	38
Depreciated Value		\$ 2,921,669	\$ 972,026	\$ 639,715	\$ 692,200	\$ 371,600	\$ 146,520

JANUARY 1, 1965

Exhibit 25

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TOTAL ROLLING STOCK OWNED OR LEASED BY WABASH R.R. CO. IN STATE OF MISSOURI ON APRIL 1, 1964

Year of Acquisition		1950 and Prior	1951	1952	1953	1954	1955	1956	1957	1958
Freight Cars										
	Cost Units	\$ 3,298,101 1,071	\$ 452,014 86	\$ 371,859 59	\$ 497,462 68	\$ 247,460 34	\$ 290,846 36	\$ 1,090,868 124	\$ 1,584,143 172	\$ 323,058
Condition Per Cent		25	30	35	40	45	50	55	60	65
Depreciated Value		\$ 824,525	\$ 135,604	\$ 130,151	\$ 198,985	\$ 111,357	\$ 145,423	\$ 599,977	\$ 950,486	\$ 210,000
Diesel Locomotives										
	Cost Units	\$ 6,206,815 45	\$ 1,989,281 13	\$ 1,900,141 12	\$ 873,228 7	\$ 683,144 4		\$ 336,823 2		
Condition Per Cent		25	30	35	40	45		55		
Depreciated Value		\$ 1,551,704	\$ 596,784	\$ 665,049	\$ 349,291	\$ 307,415		\$ 185,253		
Work Equipment										
	Cost Units	\$ 290,513 84	\$ 1,473 1	\$ 4,216 3	\$ 8,679 3	\$ 2,741 2	\$ 1,402 1	\$ 39,624 30	\$ 3,057 2	\$ 20,201
Condition Per Cent		25	30	35	40	45	50	55	60	64
Depreciated Value		\$ 72,628	\$ 442	\$ 1,476	\$ 3,472	\$ 1,233	\$ 701	\$ 21,793	\$ 1,834	\$ 13,141
Passenger Train Cars										
	Cost Units	\$ 1,319,181 23		\$ 256,700 1					\$ 76,429 1	\$ 258,6
Condition Per Cent		25		35					60	
Depreciated Value		\$ 329,795		\$ 89,845					\$ 45,857	\$ 168,1
Pullman Cars										
	Cost Units							\$ 196,144 1		
Condition Per Cent								50		
Depreciated Value								\$ 98,072		
Grand Total										
	Cost Units	\$11,114,610 1,223	\$2,442,768 100	\$2,532,916 75	\$1,379,369 78	\$ 933,345 40	\$ 488,392 38	\$1,467,315 156	\$1,663,629 175	\$ 601,4
Depreciated Value		\$ 2,778,652	\$ 732,830	\$ 886,521	\$ 551,748	\$ 420,005	\$ 244,196	\$ 807,023	\$ 998,177	\$ 391,4

1956	1957	1958	1959	1960	1961	1962	1963	1964	Total
\$ 1,090,868 124	\$ 1,584,143 172	\$ 323,080 34	\$ 555,998 54	\$ 404,132 38	\$ 231,250 26	\$ 322,457 45	\$ 768,674 276	\$ 554,239 88	\$10,992,583 2,211
55	60	65	70	75	80	85	90	95	
\$ 599,977	\$ 950,486	\$ 210,002	\$ 389,199	\$ 303,099	\$ 185,000	\$ 274,088	\$ 691,807	\$ 526,527	\$ 5,676,230
 \$ 336,823 2				\$ 30,527 1	\$ 1,566,362 7		\$ 910,113 5	\$ 14,496,434 96	
55					80	85		95	
\$ 185,253				\$ 24,422	\$ 1,331,408		\$ 864,607	\$ 5,875,933	
 \$ 39,624 30	\$ 3,057 2	\$ 20,208 2		\$ 18,609 27	\$ 25,455 38		\$ 30,960 6	\$ 446,937 199	
55	60	65		75	85		95		
\$ 21,793	\$ 1,834	\$ 13,135		\$ 13,957	\$ 21,637		\$ 29,412	\$ 181,720	
 \$ 76,429 1	\$ 258,690 5	\$ 36,867 3			\$ 48,290 2			\$ 1,996,157 35	
60	65	70			90				
\$ 45,857	\$ 168,149	\$ 25,807			\$ 43,461			\$ 702,914	
									\$ 196,144 1
									\$ 98,072
 \$ 1,467,315 156	\$ 1,663,629 175	\$ 601,978 41	\$ 592,865 57	\$ 422,741 65	\$ 261,777 27	\$ 1,914,274 90	\$ 816,964 278	\$ 1,495,312 99	\$28,128,255 2,542
\$ 807,023	\$ 998,177	\$ 391,286	\$ 415,006	\$ 317,056	\$ 209,422	\$ 1,627,133	\$ 735,268	\$ 1,420,546	\$12,534,869 47%
									\$ 5,891,388 Equalization factor used by Mo. State Tax Commission

TOTAL ROLLING STOCK OWNED OR LEASED BY WABASH R.R. CO. IN STATE OF MISSOURI ON JULY 1, 1964

Year of Acquisition		1950 and Prior	1951	1952	1953	1954	1955	1956	1957	
<i>Freight Cars</i>										
	Cost	\$ 4,209,944	\$ 517,219	\$ 662,329	\$ 637,489	\$ 258,632	\$ 167,699	\$ 1,040,213	\$ 1,576,191	\$ 171
	Units	1,333	91	110	80	34	21	120	120	171
Condition Per Cent		25	30	35	40	45	50	55	60	
Depreciated Value		\$ 1,052,486	\$ 153,166	\$ 231,815	\$ 254,996	\$ 116,384	\$ 83,850	\$ 572,117	\$ 945,715	\$ 27
<i>Diesel Locomotives</i>										
	Cost	\$ 5,889,242	\$ 2,424,446	\$ 2,003,809	\$ 1,288,134	\$ 512,358				
	Units	43	15	13	10	3				
Condition Per Cent		25	30	35	40	45				
Depreciated Value		\$ 1,472,311	\$ 727,334	\$ 701,333	\$ 515,254	\$ 230,561				
<i>Work Equipment</i>										
	Cost	\$ 319,456	\$ 6,103	\$ 4,216	\$ 8,679	\$ 2,738	\$ 1,402	\$ 42,928	\$ 3,057	\$ 2
	Units	89	3	3	3	2	1	32	32	2
Condition Per Cent		25	30	35	40	45	50	55	60	
Depreciated Value		\$ 79,864	\$ 1,831	\$ 1,476	\$ 3,472	\$ 1,232	\$ 701	\$ 23,610	\$ 1,834	\$ 1
<i>Passenger Train Cars</i>										
	Cost	\$ 1,704,541		\$ 256,700					\$ 76,429	\$ 2
	Units	26		1					-1	
Condition Per Cent		25		35					60	
Depreciated Value		\$ 426,135		\$ 89,845					\$ 45,857	\$ 1
<i>Pullman Cars</i>										
	Cost						\$ 196,144			
	Units						1			
Condition Per Cent							50			
Depreciated Value							\$ 98,072			
<i>Grand Total</i>										
	Cost	\$12,123,183	\$2,947,768	\$2,927,054	\$1,934,302	\$ 773,728	\$ 365,245	\$1,083,141	\$1,655,677	\$ 6
	Units	1,491	109	127	93	39	23	152	174	
Depreciated Value		\$ 3,030,796	\$ 884,331	\$ 1,024,469	\$ 773,722	\$ 348,177	\$ 182,623	\$ 595,727	\$ 993,406	\$ 4

Exhibit 27

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ON JULY 1, 1964

TOTAL ROLLING STOCK OWNED OR LEASED BY WABASH R.R. CO. IN STATE OF MISSOURI ON OCTOBER 1, 1964

Year of Acquisition		1950 and Prior	1951	1952	1953	1954	1955	1956	1957	1958	1959
<i>Freight Cars</i>											
	Cost Units	\$ 3,948,551 1,250	\$ 608,057 104	\$ 533,285 88	\$ 564,433 72	\$ 318,051 38	\$ 221,675 28	\$ 1,244,627 141	\$ 1,436,138 155	\$ 402,046 41	\$ 995,768 87
Condition Per Cent		25	30	35	40	45	50	55	60	65	70
Depreciated Value		\$ 987,138	\$ 182,417	\$ 186,650	\$ 225,773	\$ 143,123	\$ 110,838	\$ 684,545	\$ 861,683	\$ 261,330	\$ 697,038
<i>Diesel Locomotives</i>											
	Cost Units	\$ 4,711,335 36	\$ 3,110,224 18	\$ 1,999,381 13	\$ 774,410 7	\$ 170,787 1		\$ 168,458 1			
Condition Per Cent		25	30	35	40	45		55			
Depreciated Value		\$ 1,177,834	\$ 933,067	\$ 699,783	\$ 309,764	\$ 76,854		\$ 92,652			
<i>Work Equipment</i>											
	Cost Units	\$ 272,038 91	\$ 1,473 1	\$ 4,216 3	\$ 4,279 2	\$ 1,369 1		\$ 47,332 35	\$ 3,057 2	\$ 20,208 2	
Condition Per Cent		25	30	35	40	45		55	60	65	
Depreciated Value		\$ 68,010	\$ 442	\$ 1,476	\$ 1,712	\$ 616		\$ 26,033	\$ 1,834	\$ 13,135	
<i>Passenger Train Cars</i>											
	Cost Units	\$ 1,524,333 26		\$ 256,700 1					\$ 76,429 1	\$ 206,952 4	\$ 49,156 4
Condition Per Cent		25		35					60	65	70
Depreciated Value		\$ 381,083		\$ 89,845				\$ 45,857	\$ 134,519	\$ 34,409	
<i>Pullman Cars</i>											
	Cost Units	None									
Condition Per Cent											
Depreciated Value											
<i>Grand Total</i>											
	Cost Units	\$ 10,456,257 1,403	\$ 3,719,754 123	\$ 2,793,582 105	\$ 1,343,122 81	\$ 490,207 40	\$ 221,675 28	\$ 1,460,417 177	\$ 1,515,624 158	\$ 629,206 47	\$ 1,044,924 91
Depreciated Value		\$ 2,614,065	\$ 1,115,926	\$ 977,754	\$ 537,249	\$ 220,593	\$ 110,838	\$ 803,230	\$ 909,374	\$ 408,984	\$ 731,447

ON OCTOBER 1, 1964

Exhibit 28

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TOTAL ROLLING STOCK OWNED OR LEASED BY NORFOLK & WESTERN RY. CO. IN STATE OF MISSOURI ON DECEMBER 1, 1964

Year of Acquisition		1950 and Prior	1951	1952	1953	1954	1955	1956	1957	1958	1959
<i>Freight Cars</i>											
Leased from Wabash R.R. Co.	Cost	\$ 2,857,176	\$ 339,026	\$ 173,753	\$ 410,555	\$ 240,479	\$ 135,573	\$ 863,201	\$ 1,045,462	\$ 234,781	\$ 525,140
	Units	946	63	27	53	31	17	94	110	23	51
Former N. K. P. R.R. Co.	Cost	\$ 781,977			\$ 8,665		\$ 40,138	\$ 295,880	\$ 24,331		
	Units	231			1		5	31	3		
Former P. & W. V. R.R. Co.	Cost	\$ 16,679							\$ 9,548		
	Units	4							1		
Norfolk & Western Ry. Co.	Cost	\$ 629,876	\$ 134,733	\$ 152,462	\$ 286,070	\$ 94,305	\$ 49,931	\$ 407,600	\$ 140,493	\$ 90,715	\$ 43,013
	Units	211	25	26	48	14	7	52	18	10	4
	Total Cost	\$ 4,285,708	\$ 473,759	\$ 326,215	\$ 705,290	\$ 334,784	\$ 225,642	\$ 1,566,681	\$ 1,219,834	\$ 325,496	\$ 568,153
	Total Units	1,392	88	53	102	45	29	177	132	33	55
Condition Per Cent		25	30	35	40	45	50	55	60	65	70
Depreciated Value		\$ 1,071,427	\$ 142,128	\$ 114,175	\$ 282,116	\$ 150,653	\$ 112,821	\$ 861,675	\$ 731,900	\$ 211,572	\$ 397,707
<i>Diesel Locomotives</i>											
Leased from Wabash R.R. Co.	Cost	\$ 4,636,425	\$ 2,855,758	\$ 2,049,600	\$ 794,419	\$ 170,786		\$ 350,800	\$ 124,910		
	Units	36	17	13	8	1		2	1		
Condition Per Cent		25	30	35	40	45		55	60		
Depreciated Value		\$ 1,159,106	\$ 856,727	\$ 717,360	\$ 317,768	\$ 76,854		\$ 192,940	\$ 74,946		
<i>Work Equipment</i>											
Leased from Wabash R.R. Co.	Cost	\$ 235,813		\$ 8,491	\$ 8,679	\$ 1,369	\$ 1,402	\$ 45,680	\$ 3,057	\$ 20,208	
	Units	76		5	3	1	1	34	2	2	
Condition Per Cent		25		35	40	45	50	55	60	65	
Depreciated Value		\$ 58,953		\$ 2,972	\$ 3,472	\$ 616	\$ 701	\$ 25,124	\$ 1,834	\$ 13,135	
<i>Passenger Train Cars</i>											
Leased from Wabash R.R. Co.	Cost	\$ 1,971,678		\$ 256,700					\$ 76,429	\$ 155,214	\$ 12,289
	Units	34		1					1	3	1
Condition Per Cent		25		35					60	65	70
Depreciated Value		\$ 492,920		\$ 89,845					\$ 45,857	\$ 100,889	\$ 8,602
<i>Pullman Cars</i>											
Leased from Wabash R.R. Co.	None										
<i>Grand Total</i>											
	Cost	\$11,129,624	\$3,329,517	\$2,641,006	\$1,508,388	\$ 506,939	\$ 227,044	\$1,963,161	\$1,424,230	\$ 500,918	\$ 580,442
	Units	1,538	105	72	113	47	30	213	136	38	56
Depreciated Value		\$ 2,782,406	\$ 998,855	\$ 924,352	\$ 603,356	\$ 228,123	\$ 113,522	\$1,079,739	\$ 854,537	\$ 325,596	\$ 406,309

MISSOURI ON DECEMBER 1, 1964

1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	Total
\$ 240,479 31	\$ 135,573 17	\$ 863,201 94	\$ 1,045,462 110	\$ 234,781 23	\$ 525,140 51	\$ 225,186 22	\$ 203,500 22	\$ 516,735 112	\$ 812,961 259	\$ 861,842 106	\$ 9,445,370 1,936
\$ 40,138 5	\$ 295,880 31		\$ 24,331 3		\$ 310,519 26	\$ 13,698 1	\$ 13,544 1	\$ 201,209 1	\$ 406,319 31	\$ 31 31	\$ 2,096,280 361
			\$ 9,548 1								\$ 26,227 5
\$ 94,305 14	\$ 49,931 7	\$ 407,600 52	\$ 140,493 18	\$ 90,715 10	\$ 43,013 4	\$ 231,867 24	\$ 103,460 9	\$ 128,364 14	\$ 215,915 16	\$ 64,641 5	\$ 2,773,445 483
\$ 334,784 45	\$ 225,642 29	\$ 1,566,681 177	\$ 1,219,834 132	\$ 325,496 33	\$ 568,153 55	\$ 767,572 72	\$ 320,658 32	\$ 658,643 127	\$ 1,230,085 306	\$ 1,332,802 142	\$ 14,341,322 2,785
\$ 150,653	\$ 112,821	\$ 861,675	\$ 731,900	\$ 211,572	\$ 397,707	\$ 575,679	\$ 256,526	\$ 559,847	\$ 1,107,076	\$ 1,266,162	\$ 7,841,464
\$ 170,786 1		\$ 350,800 2	\$ 124,910 1					\$ 2,237,660 10		\$ 1,229,917 10	\$ 14,450,275 98
\$ 76,854		\$ 192,940	\$ 74,946					\$ 1,902,011 85		\$ 1,168,421 95	\$ 6,466,133
\$ 1,369 1	\$ 1,402 1	\$ 45,680 34	\$ 3,057 2	\$ 20,208 2		\$ 17,285 25	\$ 24,125 36		\$ 25,800 80		\$ 391,909 190
\$ 616	\$ 701	\$ 25,124	\$ 1,834	\$ 13,135		\$ 13,828 85	\$ 20,506 85		\$ 24,510 85		\$ 165,651
			\$ 76,429 1	\$ 155,214 3	\$ 12,289 1			\$ 56,910 90	\$ 20,521 95		\$ 2,549,741 44
			\$ 60 65	\$ 100,889 70	\$ 8,602			\$ 51,219 90	\$ 19,495 95		\$ 808,827
			\$ 45,857								None
\$ 506,939 47	\$ 227,044 30	\$ 1,963,161 213	\$ 1,424,230 136	\$ 500,918 38	\$ 580,442 56	\$ 767,572 72	\$ 337,943 57	\$ 2,920,428 173	\$ 1,286,995 309	\$ 2,609,040 158	\$ 31,733,247 3,117
\$ 228,123	\$ 113,522	\$ 1,079,739	\$ 854,537	\$ 325,596	\$ 406,309	\$ 575,679	\$ 270,354	\$ 2,482,364	\$ 1,158,295	\$ 2,478,588	\$ 15,282,075 47%
											\$ 7,182,575
											Equalization factor used by Mo. State Tax Commission

FILED

JUL 3 1967

JOHN F. DAVIS, CLERK

No. 324

Supreme Court of the United States

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants.*

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
HOWARD L. LOVE; J. RALPH HUTCHINSON, Members
of the Missouri State Tax Commission, and J. R.
Towsley, Secretary of the Missouri State Tax
Commission, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1967

No.

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants,*

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
HOWARD L. LOVE; J. RALPH HUTCHINSON, Members
of the Missouri State Tax Commission, and J. R.
Towson, Secretary of the Missouri State Tax
Commission, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Missouri, which affirmed a trial court judgment sustaining against federal constitutional challenge the assessment by a state agency of their properties for purposes of ad valorem taxation.

OPINIONS BELOW

The Circuit Court of Cole County, Missouri, did not render an opinion. The opinion of the Supreme Court of Missouri (R. 176-92) is not reported. It is printed as Appendix B to this Statement (pp. 4a-21a, *infra*).

JURISDICTION

This is a proceeding brought by appellants challenging the assessment of their properties for ad valorem property taxation purposes on the ground that the state statute under which the Missouri State Tax Commission assessed their properties was invalid in its application to them. The judgment of the Supreme Court of Missouri (R. 175; 21a, *infra*) was entered on December 30, 1966. A timely filed motion for rehearing was denied on February 13, 1967. A notice of appeal to this Court was filed in the Supreme Court of Missouri on May 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Great Northern Ry. v. Minnesota*, 278 U.S. 503 (1929); *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919).

STATUTES INVOLVED

Section 151.060(3) of the Statutes of Missouri provides in its part most pertinent to this case:

- “In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is en-

titled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Section 151.060 and other Missouri statutory provisions are set out in full in Appendix A to this Statement (pp. 1a-3a, *infra*).

QUESTIONS PRESENTED

Section 151.060 of the Revised Statutes of Missouri prescribes a formula for assessing the rolling stock of interstate railroads for the purpose of ad valorem property taxation. The formula involves the application to a value determined for a railroad's entire complement of rolling stock of the ratio of the miles of road operated in Missouri to the railroad's total road mileage. On October 16, 1964, the appellant Norfolk & Western became the lessee of all the properties of the appellant Wabash, which had tracks and operations in Missouri, as the Norfolk & Western did not. For the following year, as of January 1, 1965, a property tax assessment for rolling stock was made against the Norfolk & Western based upon applying to the value of the entire Norfolk & Western fleet, owned and leased, the ratio of the leased road mileage in Missouri to total Norfolk & Western mileage.

The questions presented are these:

1. Whether, in its application to these appellants, Section 151.060 of the Revised Statutes of Missouri is

repugnant to the Constitution of the United States in that it lays an undue burden upon or discriminates against interstate commerce in violation of the commerce clause, Article I, Section 8, or deprives them of property without due process of law in violation of the Fourteenth Amendment because in such application it results in an assessment of railroad rolling stock for Missouri property taxation purposes greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

2. Whether the use by the Missouri State Tax Commission solely of a mileage ratio formula in assessing the value of the appellants' rolling stock for Missouri property tax purposes contravenes the Constitution of the United States by laying an undue burden upon or discriminating against interstate commerce in violation of the commerce clause, Article I, Section 8, or by depriving these appellants of property without due process of law in violation of the Fourteenth Amendment because the use of the formula results in an assessment greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

STATEMENT

On October 16, 1964, the appellant Norfolk & Western Railway Company acquired all the properties of the appellant Wabash Railroad Company under a long-term lease. The Wabash, an Ohio corporation that does not maintain its principal office in Missouri, has lines of track in Missouri and operated trains over those tracks. At the time the lease became effective the Norfolk & Western had no tracks in Missouri or other

operational connection with that state. It is a Virginia corporation with its principal office in Roanoke. As lessee of all the properties of the Wabash, the Norfolk & Western became liable for the ad valorem property taxes on such properties located within Missouri. Subsequently, as of January 1, 1966, the Norfolk & Western bought the Wabash rolling stock previously leased; it continues to lease the fixed property of the Wabash.

The questions in this case arise from the assessment of rolling stock for Missouri property tax purposes in the first tax year after the lease.¹ The assessment was for nearly \$20 million, which is almost three times as much as the taxable value of the average amount of the carriers' rolling stock—almost all of it Wabash rolling stock—in Missouri at any relevant time and more than twice what the Wabash was assessed for rolling stock the previous year, although there had been no change of any consequence in operations or in the number of locomotives and cars in Missouri.

The facts were stipulated or otherwise developed by the appellants without contradiction in the course of a hearing before the State Tax Commission on protest of its notice of an assessment in the amount stated. A summary of the facts follows.

The assessment of rolling stock was arrived at by a mechanical application by the Tax Commission of the formula prescribed in Section 151.060 of the Revised Statutes of Missouri. The formula there prescribed is a form of the familiar mileage ratio formula. Acting

¹ The questions recur with each yearly assessment. The Missouri Tax Commission has followed the same questioned method in assessing appellants' property in 1966 and 1967.

under the formula, the Tax Commission first determined the value of all rolling stock owned or leased by the Norfolk & Western as of the tax day, January 1, 1965. This determination was made by simply totaling the cost, less accrued depreciation at 5 per cent a year (up to 75 per cent of cost), of each locomotive, car and other item of rolling stock. The determination is made in the same way for every interstate railroad operating in Missouri. In appellants' case the determination was based on data submitted by the appellants (*see Exs 1, 32, 40*), which the Commission accepted without question. Then, as it did for all railroads and utilities for the year 1965, the Commission took 47 per cent of the total value as the equalized value of the Norfolk & Western's entire complement of rolling stock.² Having determined that slightly more than 8 per cent of the mileage of all the main and branch line road owned, leased or controlled by the Norfolk & Western was within Missouri, the Commission applied this percentage to the overall depreciated equalized rolling stock value. The resulting figure was \$19,981,757. Fixed property, which is valued physically without resort to the mileage formula, was assessed at \$12,177,597. (No question was raised below or is raised on this appeal concerning the valuation of fixed property.) The Commission deducted from the sum of these two figures \$860,415, representing a so-called "economic factor" that is allowed to all railroads in varying amounts. (R. 8-10). An "economic factor"

² The computation of an equalized value is the traditional process sometimes described as assigning or computing an assessed value, which usually is less than full market value. Property other than railroad and utility property is assessed by local assessors in Missouri at a certain percentage of its market value, frequently less than 47%.

in precisely the same amount had been allowed to the Wabash in each of the immediately preceding three years. Thus, the total assessment was \$31,298,939.

The questioned part of this assessment is the nearly \$20 million purportedly representing the value of appellants' rolling stock in Missouri. This figure was derived by applying the statutory formula to the total depreciated, equalized value of appellants' fleet of rolling stock, the great bulk of which is specialized coal-carrying equipment. This equipment is used almost exclusively in the eastern coal-producing region of the United States, which requires a disproportionately large number of units, and only rarely does any of this equipment pass through Missouri. In 1964, 70 per cent of the Norfolk & Western's total revenue was from coal traffic. More coal is loaded on its line than on the line of any other railroad in the United States. Its coal traffic moves from the mines of Virginia, West Virginia and Kentucky to the seaboard area and the manufacturing centers of the East and to the steel mills in the Great Lakes area. During 1964 less than .03 per cent of all Norfolk & Western shipments of coal from Virginia, West Virginia and Kentucky could have gone through Missouri, and none was destined for Missouri. (R. 56-58, 82-84; Ex. 17).

The Norfolk & Western maintains in these eastern coal mining regions special locomotives designed specifically for pulling heavy coal trains on grades and equipped with dynamic brakes for handling such loads. None of the Norfolk & Western's locomotives was in Missouri on January 1, 1965, or at any time during 1964. Their design makes it impossible to use them in combination with the locomotives employed on the

Wabash's Missouri lines, and locomotives today are customarily used in combination. (R. 61-67).

As of January 1, 1965, tax day, the Norfolk & Western owned 63,989 coal hopper cars, which are also used primarily in the coal mining regions. On tax day only 163 of these hopper cars were in Missouri either on the line leased from the Wabash or on the line of some other railroad. (R. 74-75, 88-89; Exs. 12, 14, 18, 19). Tax day was by no means atypical in this respect, for scarcely any Norfolk & Western coal mined in Virginia, West Virginia and Kentucky was shipped to points west of the Mississippi. And special rules of the Association of American Railroads issued under Interstate Commerce Commission authority require that Norfolk & Western hoppers that go off line be returned as promptly as possible to the coal mining regions of the East, so that hoppers cannot lawfully enter Missouri under the control of other railroads. (R. 58-60; Ex. 6).

A further demonstration of the unreliability of the Missouri road mileage as an index to the amount of Norfolk & Western system rolling stock in Missouri was provided by a study of traffic density. Density in Missouri as measured by ton miles per mile of road was only 54 per cent of the traffic density for the entire Norfolk & Western system. There is a close relationship between the rolling stock used in a given area and the density of traffic in that area, as measured by ton miles per mile of road. (R. 51-52, 101-02; Ex. 4).

There were, of course, some locomotives and cars of the Norfolk & Western system in Missouri on January 1, 1965, and on other days. All of these locomotives and almost all of these cars were locomotives and cars leased by the Norfolk & Western from the Wabash.

Studies showed that at 47 per cent of cost less accrued depreciation (*i.e.*, valued in the same way as the Tax Commission valued the Norfolk & Western fleet), the rolling stock owned or leased by the Norfolk & Western that was in Missouri on January 1, 1965, was worth \$7,628,297. In this respect again, tax day was representative of the average presence of Norfolk & Western equipment in Missouri. On December 1, 1964, the depreciated equalized value of rolling stock owned or leased by the Norfolk & Western in Missouri was \$7,182,575. The depreciated equalized value of rolling stock owned or leased by the Wabash in Missouri on random days in 1964 before its lease to the Norfolk & Western became effective was \$5,891,388, \$7,102,891 and \$7,268,464, respectively. The average of the five figures for the relevant period is \$7,014,723. (R. 103-09, 115-20; Exs. 25-29). It was property of this value that was regularly and habitually in the state, receiving the benefits and protections afforded by the state.

The units of rolling stock actually in Missouri on January 1, 1965, amounted to 2.71 per cent of the total units of Norfolk & Western rolling stock (owned and leased) and accounted for 3.16 per cent of the value of the entire fleet to which the Commission applied the Missouri mileage ratio of 8.2824 per cent in making its assessment.

It is altogether logical that the lease of the Wabash properties by the Norfolk & Western should have had only a minimal impact, if any at all, on the amount and value of rolling stock of the combined carriers in Missouri at any time.

The Wabash is engaged in the hauling of general merchandise on a route that extends from Buffalo to

Kansas City. The acquisition of the Wabash properties by the Norfolk & Western was one of several related transactions in which, *inter alia*, the Norfolk & Western merged with the New York, Chicago & St. Louis Railroad Company, the Nickel Plate, a road that operated in somewhat the same areas as the Wabash; one difference was that the Nickel Plate did not serve Missouri. One of the primary purposes of the transactions was to provide for the Norfolk & Western a greater diversification in its traffic. The Wabash lines parallel the Nickel Plate lines at certain points, and another purpose of the Wabash lease was to effect economies by eliminating duplication of operations and facilities at those points. The only change in operations that occurred as a result of the Wabash lease, insofar as the Wabash lines in Missouri were concerned, was the routing of a few cars through Hannibal that formerly had been routed through East St. Louis. Studies indicated that there was no increase in the number of Norfolk & Western cars on the line of the Wabash at selected dates between February 1, 1964, before the lease became effective, and April 1, 1965, after it became effective. (R. 49-56; Ex. 5).

If in 1965 the Missouri Commission had applied the statutory mileage formula to the Wabash system and Wabash properties, rather than to the Norfolk & Western system and properties, the assessment of rolling stock attributable to Missouri would have been \$10,103,340. It had been \$9,177,683 the previous year.

The Tax Commission entered its decision on July 6, 1965, making final the assessment it had originally proposed. Appellants filed a petition for review of the Tax Commission's decision in a state trial court. In

their petition appellants asserted that the statutory mileage formula was invalid in its application to them on the ground that it was repugnant to the commerce clause and the due process clause of the Fourteenth Amendment. On the alternative assumption that the Tax Commission was not bound rigidly by the mileage formula, they alleged that its assessment was unlawful on the same two federal constitutional grounds. The trial court sustained the Tax Commission's decision and its assessment on the administrative record. On appeal the Supreme Court of Missouri, recognizing appellants' constitutional challenge, stated that the question was "whether Missouri's method . . . valid on its face, meets the test of reasonable or fair and workable apportionment in its application to N & W in this case." The decision of the Supreme Court was that the mileage formula was valid as applied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision below is contrary to repeated decisions of this Court that have established constitutional safeguards against abuse by the states of their unquestioned power to provide practical means of determining a tax base for the property of interstate enterprises that is constantly moving in and out of a state. The Court has held that any such means must be fair in operation and must not have the practical effect of taxing out-of-state property or subjecting the interstate enterprise to the possibility of double taxation on its property. This is a manifestation of "the continuing concern for fair apportionment which this Court has displayed over the years in scrutinizing state taxing statutes." *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 561-62 (1965). The mileage formula prescribed by Section 151.060 of the Revised

Statutes of Missouri and used by the State Tax Commission here is one resolution of the problem of valuing interstate carriers' rolling stock for tax purposes. The formula is valid on its face and, presumably, in most of its applications. This is because ordinarily rolling stock of a railroad is distributed among the states in which it operates in rough proportion to the mileage in each state. But in this case because of the concentration of Norfolk & Western coal-carrying rolling stock outside of Missouri use of the mileage formula alone resulted in an assessment greatly in excess of the value of appellants' rolling stock present in Missouri. In sanctioning such use, the Missouri Supreme Court has disregarded this Court's admonitions that both the commerce clause and the due process clause forbid the automatic, mechanical application of the mileage formula in circumstances where it yields an assessed value significantly exceeding the actual value of property present in and subject to taxation by the state.

1. Interstate commerce can be made to pay its way, and instrumentalities of commerce within a state are subject to any nondiscriminatory ad valorem tax to which other property in the state is subject. Where the instrumentalities of commerce are constantly on the move, like railroad cars and locomotives, a non-domiciliary state can assess them by a formula that fairly reflects the value of the rolling stock—constantly changing in its composition—habitually in use in the state. So much has been established at least since the decision of this Court in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). The formula approved in the *Pullman* case was the formula adopted by Missouri in its statute and used here: application to the total value of a carrier's property, or of its rolling

stock if as in Missouri roadbed and buildings are physically assessed, of the ratio of the carrier's in-state mileage to its total mileage.

The general validity of the mileage formula, reaffirmed by this Court as recently as 1949 in its application to carriers on the inland waterways, *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), is not questioned by appellants. Their reliance rather is on the substantial body of precedent in this Court's opinions that restricts the use of the mileage formula to situations in which in fact it yields a taxable value that is reasonably related to the value of property that on an average is within the assessing state. When the mileage formula is used by a state to value rolling stock of an interstate railroad, the necessary assumption is that there is a roughly even distribution of rolling stock among the states in which the railroad operates. See *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559, 562 (Mo. 1959), quoted in the opinion below (R. 186; pp. 14a-15a, *infra*). Here, because of the nature of the Norfolk & Western's operation, with its heavy concentration of coal-carrying equipment in the area of the coal mines and their natural markets, the assumption was demonstrably erroneous. It is in precisely such circumstances that this Court, invoking both the commerce clause and the due process clause, has invalidated mileage formula assessments.

That the mileage formula would not necessarily be valid in every application was made clear by the Court soon after the *Pullman* decision. In *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 431 (1894), the Court, after noting the general validity of the mileage formula, said that "there may be exceptional cases," as where—an example peculiarly apt to this case—"in

certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock.”⁸

The limits on the use of the mileage formula foreshadowed by the *Backus* decision were first applied by the Court to invalidate a state assessment in *Fargo v. Hart*, 193 U.S. 490 (1904). Mr. Justice Holmes, speaking for the Court, there explained that it is “reasonable and constitutional to get at the worth of [a line of railroad] in the absence of anything more special, by a mileage proportion.” *Id.* at 499. He said that a division by mileage is justifiable “so long as it fairly may be assumed that the different parts of a line are about equal in value” *Id.* at 500. But if a railroad “had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense.” *Ibid.* An assessment based upon a mileage formula was invalidated in *Fargo v. Hart* on the basis of both the due process clause and the commerce clause because, “it involved an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States.” *Id.* at 502.

In subsequent cases the Court has reiterated the limitations on the use of the mileage formula laid down in *Fargo v. Hart*. In *Union Tank Line Co. v. Wright*, 249

⁸ In the *Backus* case the Court upheld the statute and the assessment that were at issue but only because factors other than mileage could be considered under the statute and for all that appeared had been considered. See also *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 227 (1897); 166 U.S. 185, 222-23 (1897).

U.S. 275 (1919), the application of a mileage formula resulted in an assessment much larger than the value of the average number of cars within the state during the tax year. The Court held: "that to permit enforcement of the proposed tax would deprive [the tank line company] of property without due process of law and also unduly burden interstate commerce." *Id.* at 283.⁴ In *Wallace v. Hines*, 253 U.S. 66 (1920), the statute provided for applying to the value of a railroad's stocks and bonds the ratio of North Dakota main track mileage to total main track mileage. The Court held that on the allegations of the railroad's complaint "the circumstances are such as to make that mode of assessment indefensible." *Id.* at 69. The circumstances were that it could not fairly be presumed that the value of the line in North Dakota were proportionate to the mileage of the line in North Dakota because it cost less to build the line through the plains of North Dakota than through mountainous regions, and because it followed from North Dakota's status as an agricultural state "that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain." *Id.* at 39.⁵ See also *Nashville, C. &*

⁴ The majority opinion in *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), analyzed *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891), at some length and according to a dissent cast unnecessary doubt on the general validity of the mileage formula. 249 U.S. at 290-95. Any intimation that the *Pullman* case had been overruled was dispelled by *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), if not earlier, but *Union Tank Line* remains authority for the more limited proposition that is the basis of the questions raised by appellants here.

⁵ See pp. 20-21, *infra*, for discussion of an alternative, related ground of decision in *Wallace v. Hines*.

St. L. Ry. v. Browning, 310 U.S. 362, 365-66 (1940); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934); *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927).

Insofar as the treatment of rolling stock is concerned, the principle of the cases we have cited and quoted was distilled by Mr. Justice Douglas, concurring in *Braniff Airways v. Nebraska State Bd.*, 347 U.S. 590, 603 (1954):

“My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem.”

In this case it is quite clear that Missouri has attempted to tax more than the permitted fraction. The theory underlying a mileage formula is that rolling stock is about evenly distributed throughout a railroad's entire system. The theory was undercut by the uncontradicted facts of record here. The relevant uncontradicted facts are that the Norfolk & Western's rolling stock, particularly its special coal locomotives and hoppers, is concentrated in the coal areas miles from Missouri; that the density of its Missouri traffic is only slightly more than half that of its system as a whole, indicating a disproportionately small amount of rolling stock in Missouri; that the ratio of rolling stock in Missouri on tax day and other random days to total rolling stock was considerably less than half the ratio of Missouri mileage to total mileage, and that in consequence the attempted Missouri assessment

is almost three times the value for tax purposes of the average units of rolling stock in Missouri at any time.

2. The court below did not ignore these facts, but it completely discounted them, apparently because of an odd misapplication of the so-called "enhancement of value" theory. It noted first that valuation under a properly applied unit system of valuation takes into account the fact that "rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole . . ." (R. 185; p. 14a, *infra*). The court then observed, with respect to one of the comparisons appellants made of record, that proportions of rolling stock in Missouri, by number and by value, were not conclusive on the issue of fair apportionment "because, quite obviously, they do not recognize any justified enhanced or augmented value to the portion actually in Missouri brought about by being merged into the entire N & W system." (R. 188-89; pp. 17a-18a, *infra*). This statement betrays a misconception of (a) what this Court has said concerning enhancement of property values by reason of a unitary operation, (b) what the State Tax Commission actually did in this case and (c) what the relationship is between the original Norfolk & Western system and the old Wabash lines.

This Court has said in a number of cases that a state may constitutionally use a method of valuation (such as a method that takes account of intangible values) or choose a subject or measure for an apportioned tax (such as gross receipts) that reflects the value of property as enhanced or augmented by reason of its being a part of a system that extends outside the state. *E.g., Railway Express Agency v. Virginia*, 358 U.S. 434

(1959); *Pullman Co. v. Richardson*, 261 U.S. 330, 338 (1923); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450 (1918); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220-26 (1897); *Cleveland, C.C. & St. L. Ry. v. Backus*, 154 U.S. 439, 445-46 (1894). This idea of enhancement of value has never, however, been regarded as a justification for the taxing state's taking into its assessment a portion of the total system value not reasonably related to the value of the property that the facts show can fairly be attributed to it. The court below has said in substance that, using the mileage formula, Missouri is justified by the enhancement-of-value doctrine in taxing more than 8 per cent of appellants' rolling stock instead of the 3 per cent of locomotives and cars that were present in the state. That this course is impermissible is shown by opinions of this Court in which approbatory references to the enhancement doctrine stand side-by-side with strictures against misuse of the mileage formula to tax property outside the state. See *Wallace v. Hines*, 253 U.S. 66, 69-70 (1920); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 282 (1919); *Fargo v. Hart*, 193 U.S. 490, 499-500 (1904).

The court below misunderstood this basic concept. It seems also to have misconceived the nature of the actions of the State Tax Commission. The Commission did not profess to assess any amount to the Norfolk & Western because of a judgment that the value of the locomotives and cars that were in Missouri had increased because of the combination of the Norfolk & Western and Wabash systems. As it did for all interstate railroads, it simply applied the mileage formula to figures supplied to it by the railroads. The court below did say that "a formula alone was not the only

item available to the Commission's consideration." (R. 191; p. 20a, *infra*). If by this it meant to imply that other factors were considered by the Commission, the implication is refuted by the Commission itself. In a stipulation entered into by the Commission, the assessment steps we have described (pp. 5-7, *supra*)—which are nothing but the application of the formula—are recited, and the stipulation concludes with the statement that "as the result of the above method of assessment and computation, a total assessed valuation was made of \$31,298,939." (R. 8-10). The assessment of the rolling stock substantially exceeded the value, comparably computed, of rolling stock that on an average was in Missouri. This excess is what the Missouri Supreme Court justified as based on the enhanced or augmented value of property. But the excess was merely a necessary product of the fact that the assumption of equal division of rolling stock underlying the mileage formula was unfounded in this case because of the low density of traffic on the Missouri lines and the concentration elsewhere of dense coal traffic and the Norfolk & Western rolling stock used to handle it. The untenability of the Missouri Supreme Court's position is demonstrated by the fact that the Tax Commission did not enhance or augment the value of the fixed property of the Wabash in Missouri, *i.e.*, roadbed and buildings, leased by the Norfolk & Western. These items are assessed without use of a formula, and the assessment of them to the Norfolk & Western was of the same order as the assessment of them to the Wabash in the previous year—\$12,177,597 as against \$12,092,594.

But even if the enhancement-of-value theory were available somehow to increase the quantity of rolling

stock to which Missouri can apply its tax, the Missouri Tax Commission could not properly have invoked it here. Operations in Missouri over the Wabash lines were very much the same after the lease to the Norfolk & Western as they were before. The evidence was undisputed that the coal-carrying equipment used by the Norfolk & Western in the eastern coal regions could have had no effect on the value of the rolling stock used in Missouri. This coal-hauling equipment, which accounted for a large part of the entire value of the rolling stock of the Norfolk & Western, was utilized primarily in movements from the mines of Kentucky, West Virginia and Virginia to the eastern seaboard and the Great Lakes. None of the coal from those mines carried by the Norfolk & Western during the year was destined for Missouri. Thus it cannot be said that the coal-hauling equipment "in some plain and fairly intelligible way . . . adds to the value of the road and the rights exercised in the state," a prerequisite established by this Court for taking into account property outside the state to get the true value of things within it. *See Wallace v. Hines*, 253 U.S. 66, 69 (1920). *See also Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 222 (1897).

One final point in this regard: In *Wallace v. Hines* the Court saw two defects in the use of the mileage formula. One we have previously mentioned (p. 15, *supra*)—that the circumstances belied an assumption that the per mile value of track within the state was equal to the per mile value of track outside the state. The other is the defect suggested by the passage quoted just above—that "the possession of bonds secured by mortgage of lands in other States, or of a land grant in another State or of other property that adds to the

riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax" 253 U.S. at 70. Here the two bases for setting aside a mileage formula assessment or invalidating a mileage formula statute in its application coalesce. The coal operations, physically separated from Missouri, that make the Norfolk & Western's Missouri tracks abnormally low in the amount of rolling stock using them likewise do not add to the value of the track or the cars that operate over it.

3. There is undoubtedly room for flexibility and ingenuity in devising and applying formulas for state taxation of items like railroad cars. In emphasizing the disparity between the result yielded by mechanical application of the Missouri mileage formula and the value of Norfolk & Western rolling stock that on an average was in Missouri, we do not mean to imply that a state is restricted to counting cars on typical days and valuing them. It is, however, worthwhile to recall that the proper aim of any formula is to determine the value of what is within the state. In a case such as this of a nondomiciliary state, it is only what is within the state, what is habitually present there, that is subject to taxation. And the average number of units of rolling stock within the state has been regarded by this Court as the most obvious and natural index to the magnitude of what is habitually present. See *Central R.R. v. Pennsylvania*, 370 U.S. 607, 613-14 (1962); *Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158, 162-63 (1933).

This point takes on added importance from this Court's decision in *Central R.R. v. Pennsylvania*, *supra*. There the Court reaffirmed the rule that the state of domicile may constitutionally tax the entire

value of a carrier's fleet, other than the value attributable to units shown to be habitually present in a particular other state and thus subject to taxation by it. See *New York Cent. R.R. v. Miller*, 202 U.S. 584 (1906). And, as we have indicated above, the Court was explicit that daily average units in a state is a proper measure of habitual presence in the state.⁶ See 370 U.S. at 613-14.

In the light of this decision, the decision below raises distinct possibilities of effective double taxation of portions of a carrier's fleet. For on a fair reading of the *Central Railroad* opinion a domiciliary state need not accommodate its taxation policy to the possibility that a mileage formula such as Missouri's will yield a result far removed from any fair valuation of the average number of cars in Missouri; and it appears that a nondomiciliary state may tax the average number of rolling units of stock within its borders without regard to the fact that by operation of the mileage formula a part of their value may have been subjected to tax in some other state.

CONCLUSION

The decision below conflicts with decisions of this Court. It cannot be sustained on the ground advanced

⁶ When the Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), sanctioned assessment of vessels on inland waterways according to the mileage formula, it noted an objection that the visits of the vessels to the assessing state were sporadic "and that there was no average number of vessels in the State every day." *Id.* at 175. The Court did not pass upon the objection, accepting the assurance of the assessing state's attorney general that the statute was meant to cover and did cover "an average portion of property permanently within the State—and by permanently is meant throughout the taxing year." *Id.* at 175; see *Central R.R. v. Pennsylvania*, 370 U.S. 607, 617 (1962).

by the court below to sustain it. If allowed to stand, it invites double taxation of railroad rolling stock. Probable jurisdiction should be noted and the case set for argument on the merits.

Respectfully submitted,

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APPENDIX A

Mo. Ann. Stat. (1949):

**§ 138.420. Power of original assessment—notification
—modification of decision**

1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms.
2. After original assessments of the state tax commission have been completed each corporation, person or public utility interested therein shall be promptly notified of the action of the commission and shall have the right to apply for a rehearing. The commission shall grant and hold such rehearing and fix the date thereof.
3. If, after such rehearing and a consideration of the facts, the commission shall be of the opinion that the original decision or any part thereof should be changed, the commission may change or modify the same and such assessed valuations as are finally determined shall be certified to the clerks of the several county courts and to the assessor in St. Louis city at the same time that valuations of real and tangible personal property are returned.
4. Said commission shall also have all power of original assessment of real and tangible property in the possession of any assessing officer on January first.

§ 151.010. What railroads are taxable

All railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all real property, tangible personal property, and intangible personal property, owned, hired or leased by any railroad company or corporation in this state, shall be subject to taxation, and taxes levied on real property, and tangible

personal property, shall be levied in the manner herein set forth, and the taxes on intangible personal property shall be levied and collected in the manner otherwise provided by law.

§ 151.020. Railroad companies to make annual statement to state tax commission—penalty

1. On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof.

2. In case the report, from any railroad, required by this section, is not received by May first of the year in which it is due the state tax commission may, at its discretion, increase by four per cent the total assessed valuation of the railroad company and certify such increase to the director of revenue for collection.

§ 151.060. Commission to assess, adjust and equalize valuation—hearings

1. The state tax commission shall assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 151.020.

2. The commission shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other tangible property belonging to said railroad companies, or tangible property belonging to any railroad companies in this state of the kind specified in section 151.020, upon which no returns have been made, which may be otherwise known to them, as they deem just and right.

3. In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

SEPTEMBER SESSION, 1966

No. 51,943

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation,
and WABASH RAILROAD COMPANY, a Corporation,
Appellants,

v.

MISSOURI STATE TAX COMMISSION, HUNTER PHILLIPS, HOWARD
L. LOVE, J. RALPH HUTCHISON, Members of the Missouri
State Tax Commission, and J. R. Towson, Secretary
of the Missouri State Tax Commission,

Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

The Honorable James T. Riley, Judge

Proceeding under Section 536.100, et seq., V.A.M.S., for judicial review of a final decision of the State Tax Commission of Missouri. The circuit court affirmed the decision, and the railroad's appeal involves construction of the revenue laws of the state.

Appellants Wabash and Norfolk and Western entered into a lease effective October 16, 1964, whereby N & W leased all of the rolling stock and roadbed owned by Wabash in Missouri and elsewhere. As part of the payment due under the lease, N & W is to pay all taxes on the demised property. Also effective October 16, 1964, were a merger of the New York, Chicago and St. Louis Railroad Company (Nickel Plate) with N & W and a lease of the rolling stock and roadbed of the Pittsburgh and West Virginia Railway Company by N & W. Prior to the leases and merger Nickel Plate, P & WV, and N & W did not run into Missouri.

Appellants furnished statements required of all affected railroads by Section 151.020, V.A.M.S., "setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks, in each county, etc., * * *; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof." On June 2, 1965, N & W was notified that its assessment for 1965 taxes on such properties was \$31,298,939. The notice advised also that a hearing relative to the assessment would be held June 15, 1965, and "please be prepared to submit detailed information on leased equipment including copies of such leases and any other pertinent data." The hearing was recessed until June 23, 1965, at which time appellants offered evidence on various matters including the depreciated value of property in the name of Wabash alone, studies concerning rolling stock actually in Missouri, the nature of appellants' business including coal hauling in the eastern United States, and figures relating to locomotives and coal hoppers employed in the coal-hauling portion of appellants' business. Appellants' corporate status and the commission's mode of computation were stipulated.

The commission entered its Findings of Fact, Conclusions of Law and Decision:

"FINDINGS OF FACT"

"The Petitioner, Norfolk and Western Railway Company, is incorporated under the laws of the Commonwealth of Virginia with its principal office and place of business in Roanoke, Virginia; The Wabash Railroad Company is incorporated under the laws of Ohio with its principal

offices and places of business in Wilmington, Delaware and Philadelphia, Pennsylvania. Norfolk and Western Railway Company owns no track or roadbed within Missouri but leases all of the track, roadbed, rolling stock and all other property owned by the Wabash Railroad Company in this State, pursuant to a lease dated March 1, 1961, as amended October 1, 1964, effective as of October 16, 1964. Petitioner owns and leases an extensive railway system which it operates in States other than the State of Missouri.

"Pursuant to the information submitted by Petitioner to the Commission on Form 1, on May 15, 1965, the State Tax Commission of Missouri, on June 2, 1965, placed a total assessed valuation of \$31,298,939 on Petitioner's property in Missouri for taxes for the year 1965.

"Said Assessment included an assessed value for roadbed in the amount of \$11,677,875; for buildings in the amount of \$499,722; and for rolling stock in the amount of \$19,981,757, less \$860,415, which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts.

"To arrive at assessed value of rolling stock taxable in the State of Missouri, the Commission determined the assessed value of the entire rolling stock of the Petitioner, wherever situated, for the year 1965, to be in the amount of \$513,309,877. This was arrived at as in all other railroad assessments made by the State Tax Commission of Missouri, by taking the original cost of the equipment by the year of acquisition and allowing five percent depreciation per year but with a maximum depreciation of Seventy-five percent of original cost. Thereafter, in this case, as in the case of all railroad assessments for the year 1965, a factor of forty-seven percent was applied by the State Tax Commission resulting, in this case in the figure of \$241,255,643. The track formula was then determined and it was found that 8.2824 percent of all of the main and branch line tracks owned or leased everywhere by Peti-

tioner, were leased, owned, or controlled by Norfolk and Western in Missouri. This percentage of the above value of the depreciated rolling stock was determined to be \$19,981,757 and was by the Commission stated to be the value of the rolling stock properly taxable in Missouri. The figures used in this determination were furnished the Commission by Petitioner in Form 1, which was filed with the Commission.

"That from the total value of the fixed property, which includes the roadbed and buildings, assessed in Missouri at \$12,177,597 which property was owned by the Wabash Railroad Company and leased to Norfolk and Western, plus the above assessed value of the rolling stock and all other property, the sum of \$860,415 was deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts, and that as a result of the above method of assessment and computation, a total assessed valuation was made of \$31,298,939.

"No assessment has been made against Wabash Railroad Company for the property leased to Petitioner.

"The Petitioner, on June 15, 1965, filed a request for adjustment and equalization of assessment and for a hearing with respect thereto, and such hearing was granted and such rehearing heard on June 23, 1965, at the Offices of The State Tax Commission of Missouri, 501 Jefferson Building, City of Jefferson, Cole County, Missouri, and the Commission then considered the assessment placed on said property by it as of January 1, 1965. The Railway and Commission agreed that the hearing held on June 23 constituted an exhaustion of administrative remedies of the Petitioner.

"At said hearing, the Petitioner introduced evidence consisting of testimony supplemented by exhibits for the purpose of showing assessed valuation placed by the Commission on the rolling stock of Petitioner was excessive and resulted in an unjustified discrimination against Peti-

tioner in violation of the Constitutions, both of the United States and of the State of Missouri. The Petitioner did not challenge the amount of the assessment on its fixed properties.

"The State Tax Commission of Missouri has adopted uniform procedures and methods to determine the true value in money of the railroad property for assessment purposes within the State of Missouri. Such procedures and methods are designed to value all railroad property within the State of Missouri uniformly and equally with all other property within the State of Missouri. Such procedure and methods were used in assessing and valuing the petitioner's property as of January 1, 1965. The evidence failed to disclose that the property of the Petitioner was ever placed on sale in the open market.

"Utility company valuations are made by the State Tax Commission as to the distributable property and rolling stock of railroads while other properties are assessed locally by county and township assessors. The relative values of sales ratio assessments and utility assessments are separate and distinct in that there are two methods used in arriving at values, and there is no basis for comparison between the valuation of the sale of a farm or a home based on revenue stamps attached to the deed and the valuation of utility property which is not being sold frequently, or ever. There is no similarity in these two types of property or in the method of arriving at the valuations for assessing purposes thereof.

"CONCLUSIONS OF LAW

"All railroads now constructed, in the course of construction, or which shall hereafter be constructed in this State and all property, tangible personal property, and intangible personal property owned, hired or leased by any railroad company or corporation in this State shall be subject to taxation, and taxes assessed on real property,

and tangible personal property shall be assessed in the manner set forth in Chapter 151, R.S.Mo.

"Property shall be assessed for tax purposes at its true value in money or such percentage of its true value in money as may be fixed by law. There is no such thing as an absolute true value of property. The values mentioned in the Statutes are the valuations of officials whose duty it is to make them. Property, including railroad property, is not a commodity which has a fixed market value at a given period. The value is determined always by the estimate of the party who values it; all presumptions will favor the correctness of the valuations of the officials whose duty it is to make them; and their good faith and the validity of their acts is presumed. The State Tax Commission of Missouri is the sole judge of the credibility of witnesses appearing before it.

"Every owner, lessor or party having an interest in property shall have the right to appeal and to a rehearing under rules prescribed by the State Tax Commission. The said Commission shall investigate all such appeals or motions for rehearing or protests of assessments and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious.

"In assessing, adjusting and equalizing a railroad property for any year or years, the State Tax Commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the Commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this State and into another state in which a tax is levied and paid on the rolling stock of such road, then the said Commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the

number of miles of such road in this state bears to the total length of the road as owned or controlled by such company.

"In determining the total length of the road of railroad company for the purpose of determining its tax assessment, the Commission is required to take into consideration the track which is operated partially under the control of the railroad under trackage agreements as well as that which is owned by the railroad, even though such trackage agreement does not provide for the exclusive use by the railroad of the track in order to require it to be taken into consideration.

"The Assessment of the rolling stock of the Petitioner was determined in accordance with Chapter 151, R.S.Mo., particularly Section 151.060-3, in that said assessment was determined by taking that percentage of the total value of all the rolling stock of the Petitioner that the number of miles of the trackage of Petitioner in this State bears to the total length of the road as owned or controlled by Petitioner wherever situated.

"Section 151.060-3 R.S.Mo., which prescribes the formula by which the Commission determined the assessed valuation on Petitioner's rolling stock in the State of Missouri, provides a fair and reasonable method to determine that amount of rolling stock of any railroad which extends beyond the limits of the State which may be taxed by this State and does not constitute a violation of any of the rights or privileges guaranteed by the Constitution of Missouri or the Constitution of the United States:

"This formula, as used in conjunction with the determination of value using depreciation and a forty-seven percent equalization factor together with the deduction of the economic factor as set out in the Findings of Fact, were used uniformly by the Commission to arrive at assessments of the rolling stock of the various railroads in this State,

and to apply this formula to some railroads and not to others would be arbitrary and discriminatory.

"The evidence adduced by the Petitioner does not show that the valuation placed upon the rolling stock of Petitioner was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of Petitioner, nor does the evidence adduced by the Petitioner show that in applying the formula herein indicated that the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner.

"DECISION

"The Commission, after giving due consideration and study to the records, evidence and data submitted on behalf of the Commission and studying the transcript of the proceedings before it, finds that the valuation of the Petitioner's property for the year 1965 should be as follows: Thirty-One Million Two Hundred Ninety-Eight Thousand Nine Hundred Thirty-Nine Dollars, (\$31,298,939)."

Upon appeal to the circuit court the decision was affirmed without additional findings of fact or conclusions of law and, on this appeal, appellants "do not challenge the amount of the assessment of the fixed properties located in Missouri, but do challenge the manner in which assessment was made of the rolling stock, the amount of rolling stock apportioned to Missouri and the resulting excessive assessment of rolling stock." Appellants also do not question the total depreciated valuation of the entire rolling stock of N & W, \$513,309,877, the method of depreciation, the 47 percent adjustment and equalization factor, and the \$860,415 economic factor.

Appellants' contention is stated: "I. The Trial Court Erred in Affirming the Decision of the State Tax Commission, Its Findings of Fact and Conclusions of Law, and Its Assessment of Rolling Stock Against Norfolk and

Western Railway, Because Such Assessment Contravenes the Due Process Clause (Section 1) of the Fourteenth Amendment to and the Commerce Clause (Article I, Section 8) of the Constitution of the United States and the Due Process Clause of the Constitution of the State of Missouri (Article I, Section 10), in That:

"(A) The Track Formula (Sec. 151.060(3)) Was Arbitrarily and Erroneously Applied by the Commission As the Sole Method of Apportioning Rolling Stock to Missouri, Inasmuch As the Uncontradicted Evidence Established (1) a Grossly Uneven Distribution of N & W Rolling Stock Throughout Its Operations, and (2) That the Percentage of All Units, Located in Missouri at Any Given Time, Varied Substantially from the Percentage in Missouri of All Miles of Road of the Railroad.

"(B) The Tax Commission, by Its Use of the Track Formula, Alone, under the Facts of This Case, Apportioned to Missouri a Grossly Excessive Amount of Rolling Stock, with No Fair, Necessary, or Reasonable Relation to the Units of Rolling Stock Actually Present in Missouri on January 1, 1965, or to the Average Number of Units Regularly and Habitually Used in Missouri During 1964, or to the Value of Such Units.

"(C) The Tax Commission, by the Invalid and Improper Use of the Track Formula, Alone, under the Facts of This Case, Apportioned to Missouri a Grossly Excessive Amount of Rolling Stock, and Thereby Included in the Assessment Property with No Tax Situs in Missouri.

"II. * * * * Because the Decision of the Commission, its Findings of Fact, and Conclusions of Law are not Supported by Competent and Substantial Evidence Upon the Whole Record."

The State Tax Commission of Missouri has the exclusive power of original assessment of railroads, railroad cars, and rolling stock, Section 138.420(1), V.A.M.S.; "all real

property, tangible personal property, and intangible personal property, owned, hired or leased, by any railroad company or corporation in this state, shall be subject to taxation," Section 151.010, V.A.M.S.; and "In assessing, adjusting and equalizing any railroad property * * * the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company," Section 151.060(3), V.A.M.S.

Appellants recognize that a state may impose an apportioned tax on the value of the rolling stock of a non-domiciliary railroad in the manner contemplated by the Missouri statutes, "that precision may not always be reached in taxing property of a foreign corporation which moves in interstate commerce," and they "make no claim that the track formula is per se invalid," thus limiting the question as to whether Missouri's method, Section 151.060(3), valid on its face, meets the test of reasonable or fair and workable apportionment in its application to N & W in this case. General Motors Corp. v. District of Columbia, 380 U.S. 553, 562; Norfolk and W. R. Co. v. North Carolina, 297 U.S. 682, 685; St. Louis Southwestern Ry. Co. v. State Tax Commission of Mo., Mo., 319 S.W. 2d 559, 561[1].

It has been repeatedly recognized in connection with statutes similar to Section 151.060(3) that an appropriate

and constitutional method of assessment of an interstate railroad is to determine the value of the entire system "as a homogeneous unit representing a single profit-earning business," 51 Am. Jur., Taxation, § 877, and then to assign a percentage of that valuation to the taxing state according to some fair and reasonable method of apportionment. 84 C.J.S., Taxation, § 426(c). The courts have long considered that the valuation of the entire rolling stock of railroads under a unit method of assessment and the apportionment of that value to the taxing state in the proportion the number of miles of railroad operated in the taxing state bears to the total mileage of railroad in the entire system, is an equitable and eminently fair method of arriving at an assessment of rolling stock. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26; Pittsburgh etc. R. Co. v. Backus, 154 U.S. 421, 431; Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174. The theory underlying such method of assessment is that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole and may, therefore, be taxed according to its value "as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system." Pullman Co. v. Richardson, 261 U.S. 330, 338. See also Judson on Taxation, 2d Ed., §§ 258-268, discussing development of the unit method and mileage apportionment or "rule of entirety" as an acceptable method of valuation of interstate railroads; 2 Cooley, Taxation, 4th Ed., § 805, on the philosophy of taxation of railroad companies by mileage apportionment; and St. Louis Southwestern Ry. Co. v. State Tax Commission of Mo., *supra*, 319 S.W. 2d 1.c. 562[4, 5], describing the theory of Section 151.060 as being "that the rolling stock is substantially evenly divided throughout the railroad's entire system, and the percentage of all units

which are located in Missouri at any given time, or for any given period of time, will be substantially the same as the percentage of all the miles of road of the railroad located in Missouri." And it has been held that such methods are not an "attempt to tax property having a situs outside of the State, but only to place a just value on that within." Adams Express Co. v. Ohio, 165 U.S. 194, 227.

Of course, even if the validity of such methods be conceded, the results, to be valid, must be free of excessiveness and discrimination. Caution in application of such methods has been suggested in many cases, for example, Braniff Airways v. Nebraska Board, 347 U.S. 590, 603: "Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem." Fargo v. Hart, 193 U.S. 490, 500: "So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized * * * that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. * * * The same principle applies to personal property which the State would not have the right to tax directly." Pittsburgh etc. R. Co. v. Backus, supra, 154 U.S. 1.e. 431: " * * * there may be exceptional cases, * * * as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock." See also Wallace v. Hines, 253 U.S. 66, Rowley v. Chicago & N.W. R. Co., 293 U.S. 102, Union Tank Line v. Wright, 249 U.S. 275, Southern Ry. Co. v. Kentucky, 274 U.S. 76, Hans Rees' Sons v. North Carolina, 283 U.S. 123, K.C. Ft. S. & M.R. Co. v. King,

6 Cir; 120 F. 614, refusing application of mileage apportionment to accomplish obvious arbitrary or excessive results.

The stipulation and the findings and conclusions show that the commission did assess, adjust, and equalize, as required by statute, Section 151.060, and in keeping with a reasonable exercise of the philosophy of the unit method and mileage apportionment there provided. The commission ascertained the depreciated value of the rolling stock of N & W as of January 1, 1965, from the return filed by N & W pursuant to Section 151.020. That value was obtained by application of an allowable depreciation of five percent per year with a maximum of 75 percent against the original cost. To the resulting figure, \$513,309,877, the factor of 47 percent, used to equalize all railroad property in Missouri, was applied to equalize the total or entire value of N & W rolling stock with the valuation of other properties in Missouri. A percentage was then obtained by determining the proportion the mileage in Missouri, 627.61, bore to the total mileage in the N & W system, 7577.55. The proportion thus obtained, 8.282 percent, was then applied to the equalized value of N & W rolling stock to determine the amount of N & W property subject to taxation in Missouri. This amount was further adjusted by deduction of an economic factor of \$860,415 from the assessed valuation of fixed and movable property of N & W in Missouri and resulted ultimately in the valuation of N & W rolling stock of \$19,981,757. The total process thus described constitutes the assessment of N & W, all as required and provided by Section 151.060, and such assessment was made in the same manner as for all other railroads in Missouri.

Appellants introduced evidence before the commission to show that the *average* depreciated, equalized value of rolling stock regularly used in Missouri in 1964 and on January 1, 1965, was \$7,014,723 and that, while 8.2824

percent of all N & W miles were in Missouri, only 2.71 percent of all N & W units having 3.16 percent of the total depreciated, equalized value of N & W rolling stock was in Missouri on January 1, 1965. Such evidence came from exhibits showing the employment by N & W of most of its coal-hauling equipment in hauling coal from Virginia, West Virginia, and Kentucky to the eastern ports and manufacturing centers and to the Great Lakes region. Similar exhibits showed that part of the system originally operated as Wabash to be utilized mainly for hauling general merchandise between Missouri and Iowa and the east, with but a small portion of coal hauling in that area. Exhibits also showed the depreciated values of equipment belonging to the individual railroads prior to the leases and merger which put together the N & W system. These, of course, showed that the bulk of the coal-hauling equipment now in the total system came from those roads which originally served the coal-producing and demanding areas prior to the merger of all the roads into a more comprehensive and diversified system which now employs its entire rolling stock to meet the demands of a larger system serving a greater area. Other exhibits showed that the leases and merger brought about no increase in the average amount of Wabash, N & W, Nickel Plate, and P & W.V. cars in Missouri.

Use of the average number of units in the state has been held to be a fair method of assessment of interstate rolling stock, Central R. Co. v. Pennsylvania, 370 U.S. 607, Marye v. B. & O. R. Co., 127 U.S. 117, American Refrigerator Transit Co. v. Hall, 174 U.S. 70; however, figures thus obtained are not conclusive on whether the N & W assessment for 1965 based on mileage apportionment is unconstitutional, arbitrary, or grossly excessive. Nor are the figures of 2.71 percent of the total rolling stock constituting 3.16 percent of the total value conclusive on the matters of substantially even division of rolling stock and mileage throughout the system because, quite obviously, they do

not recognize any justified enhanced or augmented value to the portion actually in Missouri brought about by being merged into the entire N & W system. See Union Tank Line Co. v. Wright, *supra*, 249 U.S. 1.c. 282: "While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system.'" In Pittsburgh etc. Co. v. Backus, *supra*, the assessed railroad was created between April 1, 1890, and April 12, 1891, by merger of several existing roads. Prior to the merger, the Indiana portion of the merged property had been assessed at \$8,538,053, and the postmerger assessment was \$22,666,470, approximately the same increase as that involved here. Complaint of unconstitutional valuation was attempted to be supported in much the same manner as here and was answered: "Still it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be adjudged illegal." 154 U.S. 1.c. 432.

Much of appellants' argument is based on comparisons of the Missouri portion of the original Wabash system to the total Wabash system prior to the lease to N & W, but surely the parties to the leases and merger thought that the merged system would be more valuable than its component parts. Otherwise, common sense would suggest they remain as separate, smaller, nonintegrated entities, and it makes equally good sense for the coal-hauling equipment to be continued in the area where it is most needed. Consideration of the total value of N & W rolling stock, including its coal-hopper cars and coal-region diesel engines, in arriving at the valuation of that part of the N & W system in Missouri is not like the situations presented, for

example, in Wallace v. Hines, *supra*, where the cost of building railroads in neighboring mountain states was out of proportion to the cost of construction in North Dakota, the taxing state; in Union Tank Line Co. v. Wright, *supra*, where the number of cars of a New Jersey tank-line company claimed by Georgia bore no relation to the percentage Georgia's railroads bore to all railroads in the country; in Fargo v. Hart, *supra*, where bonds of an express company in New York bore no relation to the valuation of the company's express business in Indiana; and in Pittsburgh etc. R. Co. v. Backus, *supra*, recognizing the exceptional case of terminals of enormous value in one city out of all proportion to any other distance on the line, and the use in certain localities of a particular kind of business requiring an extra amount of rolling stock for that part of the line only. An example of the last suggestion might be the employment in a mining operation of narrow gauge rails and cars which could not be used throughout the entire system.

Appellants' figures also showed that the depreciated value of rolling stock previously owned by Wabash alone would be \$82,456,813, as compared to \$241,255,643 for the entire merged system. They concede that if, on the 1965 return, the commission had applied the formula to the Wabash part of the system and properties alone, the assessment would have amounted to \$10,103,340. Certainly, no unconstitutional disproportion is revealed in an assessment of \$19,981,757 against a total valuation of \$241,255,643, when compared to \$10,103,340 assessed against \$82,456,813, and such proportion in no way approaches the differential of 600 percent criticized in Union Tank Line Co. v. Wright, *supra*. See also Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, where an assessment of \$23,996,604.14 was held not excessive in comparison to the railroad's figure of \$16,021,296.

The decision of the state tax commission must, of course, be supported by competent and substantial evidence upon

the whole record. Drey v. State Tax Commission, Mo., 345 S.W. 2d 228. In this case the decision receives ample support from those items taken directly from appellants' statutory return of properties used in connection with mileages both within and without Missouri, "habitually, constantly and regularly used as an essential part of Norfolk and Western Railway Company within the meaning of Section 151.060." The evidence was also such as to give the commission substantial knowledge and information on the scope and type of operation conducted by N & W as well as the manner in which the operation measured by the Missouri mileage fits into the entire N & W scheme. Under the authorities that is sufficient because "(t)here is no such thing in assessments as an absolute 'true value,' and an assessment is, at best, a mere estimate; a presumption exists that the assessed valuation is correct, and the courts have no right to substitute their judgments, as such, for the values fixed by the assessor or by reviewing boards * * * and a taxpayer has the burden of establishing a discrimination." Cupples Hesse v. State Tax Commission, Mo., 329 S.W. 2d 696, 700[3-6]. Such presumption is rebuttable, of course, Koplar v. State Tax Commission, Mo., 321 S.W. 2d 686, 693[3], but it is not sufficient to assert that use of the track formula alone could well result in a "figure approximating the value of the property actually in the state" without demonstrating that or similar situation to be the case. The commission noted in its decision its prerogative of judging credibility of witnesses, and it was free to weigh, determine relevancy, and disbelieve appellants' evidence on the issues presented. May Dept. Stores Co. v. State Tax Commission, Mo., 308 S.W. 2d 748, 761[16]. It is not necessary to analyze further all the evidence or to point out all the permissible inferences, it being sufficient to say that a formula alone was not the only item available to the commission's consideration. "The noted evidence and its reasonably permissible inferences establishes the

presence of other factors and, in short, substantially supports the order and finding of the commission." State v. State Tax Commission, Mo., 384 S.W. 2d 565, 568[7].

Judgment affirmed.

ANDREW JACKSON HIGGINS
Commissioner

Houser, C., not participating.

Welborn, C., concurs.

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court.

Henley, Hyde, J. J., Streckman, Alt. J., concur.

Holman, P. J., not sitting.

JUDGMENT

And Thereafter the following proceedings were had and entered of record in said cause on the 30th day of December, 1966, to-wit:

No. 51,943

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation, and WABASH RAILROAD COMPANY, a Corporation, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION, HUNTER PHILLIPS, HOWARD L. LOVE, J. RALPH HUTCHISON, Members of the Missouri State Tax Commission, and J. R. TOWSON, Secretary of the Missouri State Tax Commission, *Respondents*.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment, aforesaid, in form aforesaid, by the said Circuit Court of Cole County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution. (Opinion filed.)



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NO. 324

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY
COMPANY and WABASH RAILROAD
COMPANY,

Appellants,

vs.

MISSOURI STATE TAX COMMISSION;
Hunter Phillips; Howard J. Love;
J. Ralph Hutchinson, Members of the
Missouri State Tax Commission, and
J. R. Towson, Secretary of the Missouri
State Tax Commission.

Appellees.

On Appeal from the Supreme Court of Missouri.

MOTION TO DISMISS OR IN THE ALTERNATIVE
TO AFFIRM.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967
NO. _____

NORFOLK AND WESTERN RAILWAY
COMPANY and WABASH RAILROAD
COMPANY,

Appellants,

vs.

MISSOURI STATE TAX COMMISSION;
Hunter Phillips; Howard J. Love;
J. Ralph Hutchinson, Members of the
Missouri State Tax Commission, and
J. R. Towson, Secretary of the Missouri
State Tax Commission.

Appellees.

On Appeal from the Supreme Court of Missouri.

**MOTION TO DISMISS OR IN THE ALTERNATIVE
TO AFFIRM.**

Appellees in the above-entitled cause move to dismiss this appeal or, in the alternative, to affirm the decision of the Supreme Court of Missouri, on the grounds that the questions presented are so unsubstantial as not to need further argument.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Decision of the State Tax Commission were included in the opinion of the Supreme Court of Missouri, which is not yet reported because of the pendency of this appeal. This opinion was printed as Appendix B to appellants' Jurisdictional Statement. The Circuit Court of Cole County did not render a

formal opinion but entered a Judgment and Order affirming the findings of the State Tax Commission.

JURISDICTION.

This proceeding was initiated by appellants before the State Tax Commission of Missouri challenging the assessment on its rolling stock for ad valorem taxes on the ground that the assessment resulted in the taxation of property not properly taxable by the State of Missouri in contravention of the Constitution of the United States, in that it lay an undue burden upon or discriminated against interstate commerce in violation of the commerce clause, Article I, Section 8, and deprives them of property without due process of law in violation of the Fourteenth Amendment.

The assessment was affirmed by the Commission on rehearing and the decision of the Commission was upheld by the Circuit Court of Cole County and subsequently the Supreme Court of Missouri upon appeal. Although appellants do not challenge the constitutionality of the assessing Missouri statute per se, they base their appeal on the provisions of 28 U.S.C. Section 1257(2) which allow an appeal "where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity."

QUESTIONS PRESENTED.

This case involves the validity of an assessment made by the Missouri State Tax Commission in accordance with Section 151.060, Revised Statutes of Missouri, which prescribes a formula for assessing the rolling stock of interstate railroads for the purposes of ad valorem taxation. This formula, sometimes called the mileage or trackage formula, apportions to Missouri that portion of the entire value of all of the rolling stock of such railroads on the ratio

of miles of road operated in Missouri to the railroads' total road mileage. On October 16, 1964, appellant, Norfolk & Western, became lessee of all of the properties of appellant, Wabash, which had tracks and operations in Missouri which Norfolk theretofore had not. For the following year, as of January 1, 1965, an assessment was made against Norfolk and Western by applying to the value of the entire N & W fleet, owned and leased, the ratio of the leased mileage in Missouri to the total Norfolk & Western mileage.

The questions presented are these:

1. Whether the Supreme Court of Missouri erred in holding that appellants' evidence presented at a hearing before the Missouri State Tax Commission, was not sufficient to overturn the assessment made by the Commission in accordance with Section 151.060, RSMo, against appellants' allegations that such assessment resulted in the placing of a valuation upon the property of N & W greatly in excess of the value of such property actually in Missouri on the tax day in violation of the commerce clause, Article I, Section 8 of the Constitution of the United States or the due process clause of the Fourteenth Amendment thereto.

STATEMENT.

The State Tax Commission of Missouri has the exclusive power of original assessment of railroads, railroad cars and rolling stock, Section 138.420 (1).* Section 151.010 subjects to taxation by the State of Missouri " * * * all real property, owned, hired or leased by any railroad company or corporation in this state, * * * ". "In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it,

*All statutory references herein, unless otherwise designated refer to the Revised Statutes of Missouri, 1959, and Vernon's Annotated Missouri Statutes, V.A.M.S.

and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Appellants, Wabash Railroad Company and Norfolk and Western Railway Company, entered into a lease effective October 16, 1964, whereby N & W leased all of the properties of Wabash under a long term lease. As part of the payment due under the lease, N & W is to pay all taxes on the leased property. Prior to the lease, N & W had no tracks in Missouri and did not operate in this state.

Thereafter, pursuant to statute and using the statements required to be furnished by all affected railroads, the Commission notified N & W that its assessment for 1965 taxes in its properties was \$31,298,939. This amount includes an assessed value for roadbeds in the amount of \$11,677,875, for buildings in the amount of \$499,722 and for rolling stock in the amount of \$19,981,757 less \$860,415, which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts.

This assessment was made against N & W as lessee of the property being assessed. No assessment was made against Wabash.

The assessment of the rolling stock leased by N & W was made in accordance with Section 151.060 (3), in that the Commission determined the assessed value of the entire

rolling stock of N & W wherever situated to be in the amount of \$513,309,877. This was arrived at as in all other railroad assessments made by the Commission by taking the original cost of the equipment by the year of acquisition and allowing five percent depreciation per year but with a maximum depreciation of seventy-five percent of the original cost. Thereafter, as in the case of all railroad assessments for the year 1965, a factor of forty-seven percent was applied by the Commission, resulting, in the figure of \$241,255,643.

The Commission then determined that 8.2824 percent of all the main and branch line tracks owned or leased everywhere by N & W, were leased, owned or controlled by N & W in Missouri. This percentage of the depreciated and equalized value of the entire amount of N & W's rolling stock was determined to be \$19,981,757.

No question has been raised concerning the valuation placed upon the leased roadbeds or buildings. Nor do appellants question the total valuation placed upon the rolling stock of N & W, wherever located, the method of depreciation and equalization nor the trackage percentage used to apportion the rolling stock.

The only question raised is whether under special circumstances allegedly present in this case, the valuation determined by the statutory formula fairly reflected that portion of N & W's rolling stock subject to taxation in this state.

At the hearing before the Commission appellants presented evidence tending to show that a large portion of the now rolling stock, consisting of expensive equipment used for its coal hauling operations in the eastern portion of the country did not enter the State of Missouri and acquired no situs in this state. Using the mileage apportionment formula under these circumstances, it was contended, constitutes

taxation of property not within the state's jurisdiction and in violation of the due process amendment and commerce clause in the Federal Constitution.

The Commission found against appellants, holding among other things, that "the evidence adduced by appellants does not show that the valuation placed upon the rolling stock of petitioner was grossly excessive nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of petitioner, nor does the evidence adduced by the petitioner show that in applying the formula herein indicated that the Commissioner acted in an unlawful, improper, arbitrary or capricious manner" (Page 11a, Jurisdictional Statement).

The Commission's Findings were affirmed upon appeal by the Circuit Court of Cole County and again by the Supreme Court of Missouri.

ARGUMENT.

The resolution of the questions presented by this appeal does not involve any new principles of law nor a departure from any established principles. It concerns only the application of recognized legal concepts to a set of facts peculiar to the appellants herein and its solution will apply to no one other than the appealing parties.

It is undisputed that the rolling stock leased by N & W was correctly assessed in accordance with the formula prescribed by Section 151.060(3). Appellants do not attack the constitutionality of the formula or the statute *per se*, but contend that because of special circumstances peculiar to the operations of N & W and its relationship with Wabash, the application of the formula to N & W is violative of the Federal Constitution.

"The problem [using any apportionment formula] under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' So far as due process is concerned the only question is whether the tax in practical operation has relation to the opportunities, benefits or protection conferred or afforded by the taxing State. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

The mileage formula used by Missouri has long been found to be an appropriate and constitutional method of apportionment when the result is fair. **Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Central Railroad Company of Pennsylvania v. Pennsylvania, 370 U.S. 607 (1962); Braniff Airways, Inc. v. Nebraska State Board, 347 U.S. 590 (1954); Ott v. Mississippi Valley Barge Line Co., supra.**

Appellants have contended that this formula as applied to N & W is not fair and violative of the requirements of the commerce clause and of due process because of the peculiar nature of its operations. They presented evidence tending to show that the lease of the Wabash system did not change the fundamentally different operation of the two railroads; that before and after the lease, Wabash operated as a carrier of general merchandise between Missouri and Iowa and the east, while a large portion of the operations of N & W consist of transporting coal throughout the eastern portion of the United States, using more expensive equipment most of which never came into Missouri. The gist of their argument is contained in Exhibit 25 wherein appellants determined the average actual value of the rolling stock present in Missouri during 1965 to be \$7,014,723.

The use of the method of apportionment advanced by appellants, commonly known as the "average number of units in a state formula," has been held to be a fair method of apportionment of interstate rolling stock. **Central Railroad Company v. Pennsylvania**, *supra*. However Missouri does not use this method of apportionment, **St. Louis Southwestern Railway Co. v. State Tax Commission**, Mo.Sup., 319 S.W.2d 559 (1959), and the figures thus obtained are not conclusive on whether the N & W assessment for 1965 based upon a mileage apportionment is unconstitutional.

The average number of units formula which considers only the value of those units actually in the taxing state, does not take into account any enhancement of the value of such units resulting from their use through an entire system. It has been repeatedly recognized that an appropriate and constitutional method of assessment of an interstate railroad is to determine the value of the entire system, as a homogenous unit representing a single profit-earning business and then to assign a percentage of that valuation ac-

cording to some fair and reasonable method of apportionment. **51 Am.Jur., Taxation Section 877; 84 C.J.S. Taxation, Section 426(c).** The mileage formula is an approved method of making such an apportionment of the valuation of an entire system.

When, as here, the rolling stock of a railroad is part of a system and has an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the whole system, although the other parts be outside the state. In other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relationship to the system. **Pullman Co. v. Richardson**, 261 U.S. 330 (1923). Valuation and apportionment of the entire system does not impose a tax upon outstate property of interstate railroads, but undertakes to tax only the allocable portion of the rolling stock of such railroads wherever operated, and the value of such stock operating exclusively outside the state is taken into account solely and only for the purpose of arriving at a just valuation of that operating within. **Adams Express Co. v. Ohio State Auditor**, 165 U.S. 194 (1897).

As this Court said in **Union Tank Line Co. v. Wright**, 249 U.S. 275 (1919), l.c. 282: "While the valuation must be just it need not be limited to the mere worth of the articles considered, separately but may include as well 'the intangible value of what we have called the organic relation of the property in the State to the whole system.' " See also **Railway Express Agency, Inc. v. Virginia**, 358 U.S. 434, (1959) and **Cudahy Packing Co. v. Minnesota**, 246 U.S. 450 (1918).

The method of apportionment relied on by appellants to prove the assessment made by the Commission was constitutionally excessive, does not take into account the increased value of the rolling stock, formerly of Wabash now operated

as a part of the N & W system, and by its use appellants seek to substitute a unit value method of apportionment which disregards a legitimate enhancement of value repeatedly approved by this Court against similar constitutional attacks.

Appellants place great reliance on the fact that the assessed value of the rolling stock leased by N. & W in this state was found to be over \$19,000,000, whereas the rolling stock of Wabash taxable in this state had been assessed at approximately \$10,000,000 on January 1, 1964. This increase of course was due to the greater valuation of the rolling stock of the entire Norfolk and Western line. Appellants contend that since the average number of units used in Missouri did not change appreciably, the valuation of the rolling stock could not be changed because of its being leased to Norfolk & Western.

However a similar situation occurred in the case of **Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Backus**, 154 U.S. 421 (1894) wherein the complaining railroad was created between April 1, 1890 and April 12, 1891, by a consolidation of several existing corporations. By virtue of the consolidation and a new act changing the method of apportionment, the assessed value property of the railroad in Indiana was increased from \$8,538,053 to \$22,666,470. As in this case, the railroad produced numerous exhibits showing that the value of the units actually operating in Indiana had not changed.

This Court ruled against the railroad saying that a mere increase in the assessment does not prove the assessment wrong and the testimony regarding the valuation of the individual units was not sufficient to prove the assessment by use of the mileage formula illegal and excessive. No evidence other than that of the railroad was presented to the Com-

mission except the testimony of the Secretary of State that in assessing the railroads property, no assessment was made except on the railroad track and rolling stock of the railroad within the state, and no assessment was made of any property of value outside the state. This statement, which was a legal conclusion of the question to be determined and thus of little, if any value, was the only difference in the facts between that case and this.

Consistently, throughout their Jurisdictional Statement, appellants have stated that the Commission acted in blind obedience to a mechanical application of the mileage formula. This is in error. The original assessment, of course, was determined by use of the prescribed formula. The burden of showing this assessment to be excessive was then placed upon appellants. **State ex rel Platz v. State Tax Commission**, Mo.Sup. 384 S.W.2d 565 (1964); **Cupples Hesse Corp. v. State Tax Commission**, Mo.Sup. 329 S.W.2d 696 (1959); **May Department Stores Co. v. State Tax Commission**, Mo.Sup. 308 S.W.2d 748 (1958).

Appellants attempted to show error at the hearing before the Commission by showing the value of the rolling stock actually in Missouri on January 1, 1965, and on subsequent dates throughout the year. Such evidence of course excludes any enhanced value resulting from the lease by N & W. After the hearing the Commission found that the tax was computed in accordance with the prescribed formula, and the evidence adduced by appellants did not show the valuation to be grossly excessive, or that it resulted in an unlawful or unconstitutional taxation of appellant's property, or that by applying the formula the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner (Jurisdictional Brief, p. 11a). Thus the findings of the Commission were not that the formula should blindly be followed, but that appellants had not presented evidence that constitu-

tionally would compel the Commission to use a different method of apportionment.

Appellants contend that the decision is contrary to those reached in **Fargo v. Hart**, 193 U.S. 490 (1904), **Union Tank Line Co. v. Wright**, *supra*, **Wallace v. Hines**, 253 U.S. 66 (1920), and **Southern Ry. Co. v. Kentucky**, 274 U.S. 76 (1927). In this case using the figure of \$7,628,297 alleged by appellants to be the value of all units of its rolling stock actually in Missouri on January 1, 1965, the admitted assessed valuation of N & W properties in Missouri would be \$18,500,757 as compared to the value set by the Commission of \$31,298,939. Thus the amount in dispute is \$12,798,182, a differential of approximately 37.7% of the entire assessment. Of course translated into taxes due, the amount would be much less. This does not compare with the "grossly excessive" valuation found in **Union Tank Line Co. v. Wright**, *supra*, wherein the taxable value was assessed at \$291,196, as compared to an actual value of \$47,310, almost six times as much. In **Nashville, C. & St. Louis Ry. v. Browning**, 310 U.S. 362 (1940), an assessment of \$23,996,604.14 was upheld against the railroads figure of \$16,021,296. In **Railway Express Agency, Inc. v. Virginia**, *supra*, the actual, unenhanced value of appellant's assets in Virginia was only .6% of its total assets while the apportionment made by Virginia upon gross receipts amounted to 1.7% of its gross receipts. Also, note the gross disparity between the valuations placed by the state and the taxpayer on the taxpayer's property in **Butler Brothers v. McColgan**, 315 U.S. 501 (1942). It is submitted that the decision in the Missouri court is not violative of the cases cited by appellants, but rather are in accordance with the cases cited herein and by the lower court.

The question appellants ask this Court to reexamine, and the criteria for such reexamination, were well stated in

Railway Express Agency, Inc. v. Virginia, supra, l.c. U.S. 458 as follows: " 'In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula (Citations). Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard less unwittingly; we displace the tax officials judgment with our own. Certainly we cannot say that the combined judgment of Commission, Board and state courts is baseless.' " (Emphasis added)

Similarly appellants herein are asking this Court to review a decision of the Supreme Court of Missouri that evidence of value presented by appellants tending to show individual unit value was not sufficient to show that a statutory valuation based upon the apportionment of the value of an entire system resulted in an unconstitutional valuation. Appellees submit that it is evident that the Missouri courts considered the question herein raised in accordance with the proper constitutional guidelines of this Court, that the decision is in conformity with previous decisions made on the question, and the evidence submitted by appellants does not show that the assessment made is so grossly excessive as to be reexamined by this Court upon constitutional questions previously considered.

LACK OF SUBSTANTIAL QUESTION.

Appellants' arguments under the heading "THE QUESTIONS PRESENTED ARE SUBSTANTIAL" are not relevant to the question of substantiality but only reiterate arguments as to the merits of their case.

The decision of the Missouri Supreme Court is not contrary to any decisions of this Court, but was reached by an application of established principles of law to a fact situation peculiar to Norfolk & Western's method of operation. As stated by appellants in their Jurisdictional Statement, p. 17:

"2. The Court below did not ignore these facts [the showing of the value of the average number of units physically present in Missouri during the year], but it completely discounted them apparently because of an odd misapplication of the so-called 'enhancement of value' theory." In effect, appellants are not saying that the court's decision is in conflict with the decisions of this Court on the questions presented, but in light of such decisions, the application was erroneous. Appellants are not asking this Court to consider a new principle of law or to prevent a violation of an established principle but to overrule an alleged misapplication of such principles to their situation.

The proper decision in this case, more so than most, turns upon its own facts. Its result will effect few if any other litigants. The question requires an interpretation of a state law, similar to other state laws which have been held to be constitutionally sound. Even if appellants would prevail, the law would not be changed, and appellants each year would be required to again prove a special fact situation requiring a different criteria for apportionment.

Appellants suggest that under the authority of **Central R.R. v. Pennsylvania**, supra, a domiciliary state might attempt to tax the entire value of a carrier's fleet, other than the value attributable to units shown to be habitually present in a particular state and subject to taxation by it, resulting in a possible double taxation.

This Court did not hold in that case that a state could go behind the taxing statutes of another state and tax rolling

stock of a domiciled railroad which had been already taxed by another state on the theory that the tax imposed by the sister state was determined by a method other than the daily average units test. Such a conclusion would invalidate the use of any apportionment formula other than the number of units test even though the mileage formula has often been approved by this Court.

Factually, the approval of the thesis advanced by appellants would enable a railroad to avoid fall taxation of its rolling stock by requiring a state in which a lesser number of units would be physically present to abandon use of a mileage formula, as they seek by this action, but continue to be assessed by the same formula where the traffic density is greater. It is quite doubtful that if N & W's coal hauling operations were in Missouri that the Commission could depart from the statutory mileage formula and attempt to raise the assessment by use of the daily average number of units method.

CONCLUSION.

The decision below is predicated, not upon the constitutionality, but on the interpretation and application of a state taxing statute in the light of constitutional principles to a special fact situation peculiar to and affecting only the involved litigants. An examination of the decision shows that it was made after consideration of constitutional principles as announced by this and other Courts and represents no departure from these principles. The only argument raised against it questions the application of such principles.

Appellees submit that the decision below is in accordance with the decisions of this Court and the arguments raised by appellants are not sufficient to require a reexamination by this Court and therefore it is respectfully requested that the appeal be dismissed, or that the decision of the Supreme Court of Missouri be affirmed inasmuch as the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

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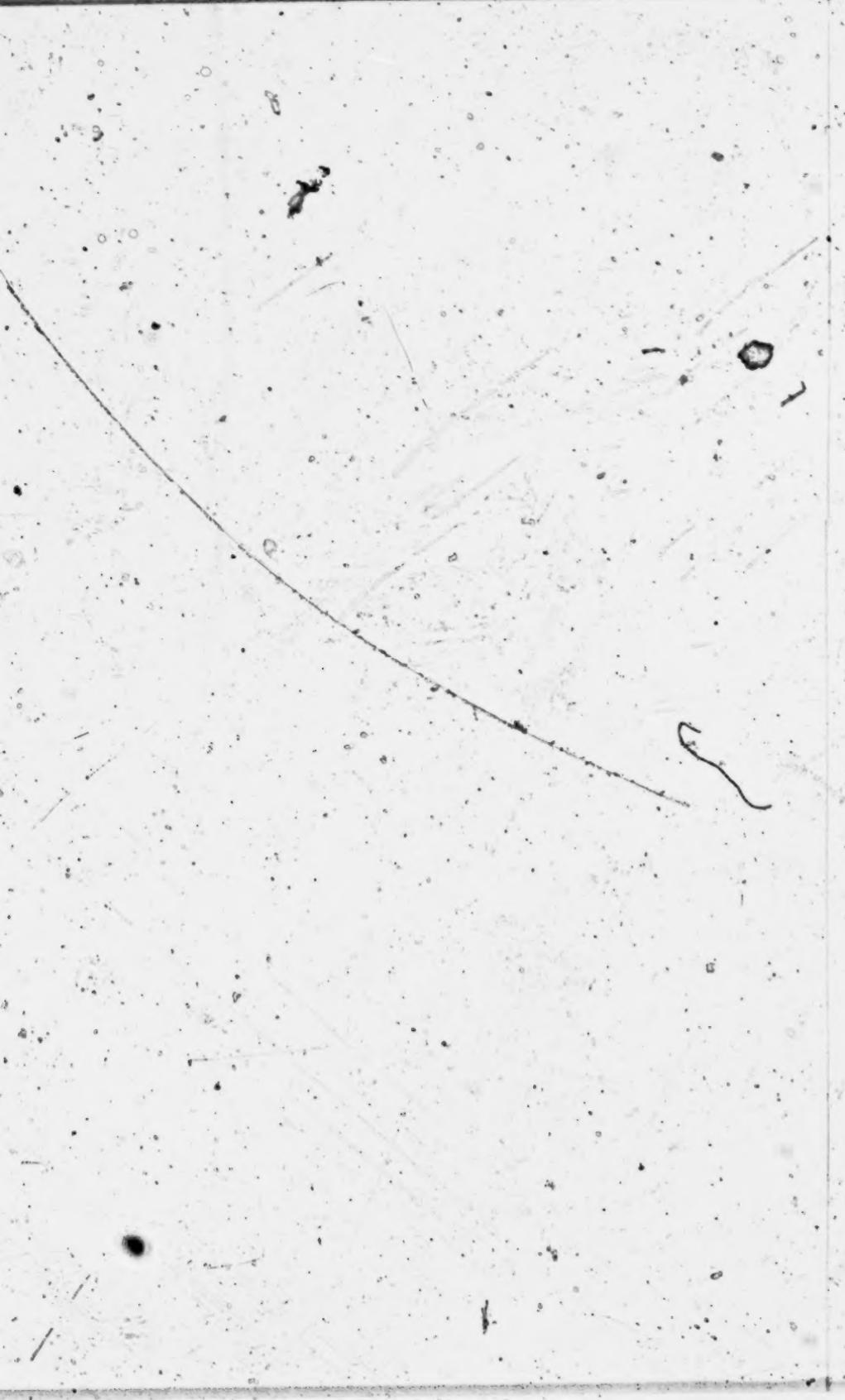
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Supreme Court of the United States

OCTOBER TERM, 1967

No. 324

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
HOWARD L. LOVE; J. RALPH HUTCHINSON, Members
of the Missouri State Tax Commission, and
J. R. Towson, Secretary of the Missouri State
Tax Commission, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR APPELLANTS IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM

I

In asking this Court to dismiss the appeal or to affirm the judgment below without plenary consideration, appellees argue that the questions presented are insubstantial because their resolution would affect only the valuation of Norfolk & Western properties in

Missouri. We submit that this kind of argument is more properly addressed to a petition for certiorari than to a case in which the Court's mandatory appellate jurisdiction is invoked.¹ In any event, the fact is that the resolution of this case will affect not only Norfolk & Western but every other railroad subjected to the risk of excessive and multiple taxation of its property by application of the Missouri formula or any formula like it.

The basic constitutional question posed is intrinsically important. We do not understand the appellees' suggestion of a constitutional distinction between "violation of established principle" and "misapplication of such principles." (Motion at 14). In its application, misapplication if you will, of the mileage formula Missouri violated the established principles that the formula may not be used for "taxing property outside the State under a pretense," *Fargo v. Hart*, 193 U.S. 490, 500 (1904), and that

"no property of . . . an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace v. Hines*, 253 U.S. 66, 69 (1920).

¹ Apart from their contentions concerning the substantiality of the questions presented, appellees do not contend the case is not properly here on appeal. They do remark that "appellants do not challenge the constitutionality of the assessing Missouri statute per se . . ." (Motion at 2; *see id.* at 7). The challenge here, as it was below (*see Jur. St.* at 10-11; R. 138-39, 154-57), is to the constitutionality of the statute as applied to appellants. There is no doubt that when such a challenge is rejected by the highest court of a state an appeal lies to this Court. *E.g.*, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

This Court has repeatedly warned of the potential for abuse inherent in the mileage formula. The caution with which the Court has approached the mileage formula has always turned on the risk that a state availing itself of the formula might reach more property than was actually within the taxing jurisdiction of the state or more income than was fairly attributable to business carried on in the state. *See Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 366 (1940); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934); *Southern Ry. v. Kentucky*, 274 U.S. 76, 82-84 (1927); *Wallace v. Hines*, *supra* at 69; *Union Tank Line Co. v. Wright*, 249 U.S. 275, 282-83 (1919); *Fargo v. Hart*, *supra* at 500; *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 434-36 (1894).

Appellants submit that the risk materialized here when the State Tax Commission, applying the Missouri statutory mileage formula mechanically, ascribed to Missouri 8.2824 per cent of the value of the Norfolk & Western's rolling stock in the face of uncontradicted and unquestionable evidence that the units of rolling stock in Missouri on January 1, 1965, actually amounted to only 2.71 per cent of the total units, and 3.16 of the money value, of the entire Norfolk & Western fleet. Missouri thus claimed taxing power over nearly three times the amount of property actually within her jurisdiction.

In pursuit of the "continuing concern for fair apportionment which this Court has displayed over the years in scrutinizing state taxing statutes," *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 561-62 (1965), the Court has frequently treated questions such as the question posed by appellants on these facts as worthy of its full-dress attention.

II

Appellees make no serious effort to counter the proposition that Missouri took into its property tax account a grossly disproportionate share of the Norfolk & Western's rolling stock. Instead, they interject an issue that confuses matters. They claim that (1) the Wabash line underwent an "enhancement in value" as a result of being leased to the Norfolk & Western; and (2) the Tax Commission used the mileage formula to measure this "enhancement in value."

This argument utterly misconceives the way in which the mileage formula works and how railroad rolling stock is valued. Nowhere in either its findings of fact or conclusions of law (Jur. St. at 5a-11a) does the Commission indicate that it considered the possibility of an enhancement in the value of Wabash rolling stock. There has been no finding by the Commission that the rolling stock of the Wabash underwent any enhancement in value whatsoever. The issue was first injected on appeal, as a defense of the Commission's use of the mileage formula. The Missouri Supreme Court, quite without reference to the record, decided that the rolling stock must have become more valuable because the parties to the transaction probably thought the combined system would be more valuable. (Jur. St. at 18a). This is mere speculation as to the business motives of the parties. It is not a finding of fact such as is entitled to deference on review by this Court. It is certainly no basis for application of the mileage formula to measure enhancement in value.

The Tax Commission plainly did not think of itself as using the mileage formula to measure enhanced

value. It did not advance the proposition that a Wabash boxcar worth \$2,000 in 1964 was worth \$6,000 in 1965 even though it was hauling the same items over the same tracks in the two years. Any such proposition was foreign to its method of valuation, which was, in the case of rolling stock, mechanically to apply the mileage formula to total valuation figures supplied by the Norfolk & Western. It is notable that the Commission's valuation of the Wabash's fixed property, which was valued physically without use of the formula, was about the same before and after the lease. (Jur. St. at 19). Unlike the rolling stock—and altogether inconsistently with the explanation offered by the court below, and now by appellees, for the increased valuation of the rolling stock—the tracks and terminals are not claimed to have been enhanced in value by the lease.

The fact is of course that no more than fixed property does rolling stock magically increase in value when it comes under the dominion of a larger railroad. Revenue from boxcars is determined by how much freight they haul; if operations do not change, their revenue-producing capacity, and therefore their value, remains constant. The undisputed evidence shows that the operations over the Wabash tracks in Missouri were substantially the same in 1965 as in 1964 and previous years. Certainly, then, there could have been no enhancement in the value of the cars that were in Missouri.

III

In the end, however, it is not so much valuation as allocation with which we are concerned in this case. And there is no support in logic, or in judicial au-

thority, for the proposition that a state can allocate to itself for tax purposes 8 per cent of an enterprise's property, when only 3 per cent of that property is within the state, on the ground that in doing so it merely recognizes the enhanced value of the property within the state caused by its being part of the larger interstate whole.

Yet that is the justification offered by the appellees for Missouri's action here. Appellants have asserted that the Tax Commission mechanically followed the mileage formula. Not so, say the appellees. They explain (Motion at 11-12) :

The Commission used the formula alone to make an initial assessment but then received appellants' evidence concerning the units and value of rolling stock actually in Missouri, the density of Missouri traffic compared to system traffic and the like. (We leave to one side the fact that much of this evidence was objected to by counsel for the Commission and its worth discounted in advance by the Chairman of the Commission, as indicated by his comments from the bench, because of their belief that it was irrelevant to the Commission's statutory duty to apply the mileage formula. [E.g., R. 43-47, 51-52, 80, 100-01]). The evidence was found by the Commission to be insufficient to justify setting aside the assessment.

But even though this uncontradicted evidence was the "clear and cogent evidence" that this Court has demanded in this kind of case, *Norfolk & Western Ry. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, 688 (1936), and showed that the Missouri mileage proportion did not yield a fair measure of the Norfolk & Western rolling stock in Missouri, the Commission stated nothing more than its bare conclusion that the

evidence was insufficient. The Commission's process of decision, it seems to us, is therefore properly described as mechanically applying the mileage formula, but, regardless of the characterization, it is clear that the formula was applied without taking account of any other factors and without explanation of why those factors were ignored.

Appellees and the Missouri Supreme Court have attempted to supply the Commission with a justification for its rejection of appellants' case. They state, in appellees' words, that appellants' "evidence excludes any enhanced value resulting from the lease by N & W." (Motion at 11; *see* Jur. St. at 17a-18a). That explanation will not do because in fact, when taken with the Commission's valuation of Norfolk & Western rolling stock as a whole, appellants' evidence established that there was no enhancement of value but that, rather, Missouri was ascribing to itself an impermissibly large share of that rolling stock.

The inadequacy of the justification offered is illustrated by appellees' discussion of the discrepancy between the assessment of rolling stock in the hands of the Wabash in one year and much the same rolling stock in the hands of Norfolk & Western the following year. (Motion at 10). The increase was from \$10 million to \$19 million. Evidence of this increase by itself did not negate the possibility that it was brought about by factors that would legitimately have entitled Missouri to assess at the higher figure. These factors might have been either (1) an augmentation of the taxable presence in Missouri (through the bringing of more cars and locomotives or more expensive cars and locomotives into the state because of integration of the Wabash and Norfolk & Western systems); or (2)

a valuation of the entirety of the Norfolk & Western's rolling stock such that the percentage that Missouri could fairly attribute to itself was of greater value than the percentage of the Wabash fleet taxable by Missouri. This latter would have been a kind of enhancement of value by reason of the lease. Within rational limits recognition of it would be in pursuit of the rule correctly stated by appellees that a state may tax an interstate railroad by valuing its entire system and then taking a percentage of that valuation "according to some *fair* and *reasonable* method of apportionment." (Motion at 8-9). (Emphasis added).

The other undisputed evidence submitted by appellants did negate the possibility either of an augmented taxable presence or a legitimately enhanced valuation. The evidence showed that there was neither an increase in the number of locomotives and cars used in the state nor an increase in value that could fairly be put upon the locomotives and cars in the state either as individual units or as parts of the Norfolk & Western fleet. The valuation of the entire fleet by the Tax Commission on the basis of data supplied by the Norfolk & Western is not questioned on either side; appellants' evidence as to the units of rolling stock in Missouri at representative times showed that by no "fair and reasonable method of apportionment" could Missouri take a share of the total value that even approached the figure at which the 1965 assessment was made.

On this view, appellants' showing of the increase in assessment was relevant to their case, even though a mere increase in an assessment does not prove the higher assessment wrong—an obvious point that appellees belabor. See *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421 (1894).

The heart of appellants' case, however, lay in their showing that the ratio of Missouri mileage to total mileage bore no reasonable relationship to the ratio of locomotives and cars in Missouri, by units and by value, to the total number of units and value of the Norfolk & Western's rolling stock. Such a showing poses the classical case for invalidation of a mileage formula in its application. *Wallace v. Hines*, 253 U.S. 66 (1920); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919); *Fargo v. Hart*, 193 U.S. 490 (1904).²

IV

The nearly \$12 million that separates the depreciated, equalized value of rolling stock in Missouri from the Commission's assessment represents the value of property elsewhere in the Norfolk & Western system. This property is subject to taxation in the states where it is habitually used; Missouri's attempt to tax it exposes Norfolk & Western to the risk of multiple taxation in any states that employ fair apportionment formulas.

As has been pointed out (Jur. St. at 21-22), this Court has recently ruled that a state of domicile may constitutionally tax the whole value of a carrier's fleet, other than units shown to be habitually present in other states. *See Central R.R. v. Pennsylvania*, 370 U.S. 607, 613-14 (1962). The preferred method of computa-

² Appellees attempt to demonstrate that the mileage formula has not been applied unconstitutionally by minimizing the relevant financial data. They claim that since appellants challenge only 37.7% of the total assessment, the error cannot be considered "grossly excessive." (Motion at 12). The claim that an error of \$12 million is not "grossly excessive" refutes itself. Moreover, the assessment of fixed properties has never been at issue here. With the elimination of fixed properties, the erroneous assessment is nearly three times a proper assessment of rolling stock. In no endeavor is such an error considered less than gross.

tion, of course, is the daily average number of cars in other states. See 370 U.S. at 613-14. If the domiciliary state is not required to adjust its formula for the possibility that some states such as Missouri will already have taxed more than their fair share of the stock, and Missouri and other states are allowed to tax according to the demonstrably arbitrary mileage formula, a carrier can be compelled to pay taxes on more than the total value of its rolling stock.

Appellees suggest that *Central R. R. v. Pennsylvania* would require a domiciliary state to refrain from taxing rolling stock that had been reached by the taxing statutes of other states—whatever the validity of the formula embodied in those statutes. That a domiciliary state would be required to defer its unquestioned right to tax, in the interest of avoiding clashes with the possibly unconstitutionally arrogated powers of another jurisdiction, seems most doubtful.

There is no merit whatever to appellees' final suggestion, which is that Missouri's statute ought not to be invalidated in its application and Missouri should be allowed to tax three times the value of the rolling stock actually in the state because in some states where traffic is denser than in Missouri use of the mileage formula might result in taxing less than those states' full share of Norfolk & Western's rolling stock. (Motion at 15). If every state used an inflexible mileage formula, there might be some point to the suggestion—although the justice of the situation would be at best a rough kind of justice. But not every state does use a mileage formula. West Virginia, for example, where much of the Norfolk & Western's coal traffic and equipment are centered, allocates value for property tax purposes on a formula that uses car and locomo-

tive miles, ton and passenger miles. These factors take full account of traffic density. See W. Va. Code Ann. ch.11, art. 6, §§ 1-2.⁸ Were Missouri so situated that the mileage formula would yield to it less than a fair share of railroad property for taxation, nothing in the Constitution would prevent it from adopting some other, more flexible formula.

CONCLUSION

For the reasons stated here and in our Jurisdictional Statement, probable jurisdiction should be noted and the case heard on the merits.

Respectfully submitted,

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August 1967

⁸The cited statute calls for certain information on property tax returns by railroads. The actual basis for assessment is composed of a combination of factors, spelled out by administrators of the taxing system in letters to railroads.



SUPREME COURT. U. S.

No. 324

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FILED

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Supreme Court of the United States, Clerk

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
HOWARD L. LOVE; J. RALPH HUTCHINSON, Members
of the Missouri State Tax Commission, and
J. R. Towson, Secretary of the Missouri
State Tax Commission, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 324

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
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of the Missouri State Tax Commission, and
J. R. TOWSON, Secretary of the Missouri
State Tax Commission, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Missouri State Tax Commission (A. 52) is not officially reported.¹ The Circuit Court of Cole County, Missouri, did not render an opinion. The opinion of the Supreme Court of Missouri (A. 69) is not yet reported.

¹ Citations to the portions of the record that are reprinted in the appendix are cited (A. 1, *et seq.*); citations to other parts of the record are cited (R. 1, *et seq.*).

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on December 30, 1966. (A. 68). A timely motion for rehearing was denied on February 13, 1967. (A. 2). A notice of appeal to this Court was filed in the Supreme Court of Missouri on May 9, 1967. (A. 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This Court noted probable jurisdiction on October 9, 1967.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 3, of the United States Constitution provides:

“The Congress shall have Power * * *

“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

The XIV Amendment, section 1, of the United States Constitution provides in pertinent part:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law;”

Section 151.060(3) of Vernon’s Annotated Missouri Statutes (1952) (hereinafter V.A.M.S.) provides in its part most pertinent to this case:

“In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such

weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Section 151.060 and sections 138.420, 147.010, 151.010, 151.020, other relevant Missouri statutory provisions, are set out in full in a section appended to this Brief. (Pp. 53-57, *infra*).

QUESTIONS PRESENTED

Section 151.060(3) of the Missouri statutes prescribes the method of assessing the rolling stock of interstate railroads for the purpose of ad valorem taxation. The ratio of the miles of main and branch line road operated in Missouri to the railroad's total such road mileage is applied to the value of the railroad's entire complement of rolling stock. On October 16, 1964, appellant Norfolk & Western, which did not previously operate in Missouri, became the lessee of all the properties of appellant Wabash, which had tracks and operations in Missouri. For the following year, as of January 1, 1965, an assessment for rolling stock was made against the Norfolk & Western. This assessment was based upon applying to the value of the entire Norfolk & Western fleet, owned or leased, the ratio of the leased road mileage in Missouri to total Norfolk & Western system mileage.

The questions presented are these:

1. Whether, in its application to these appellants, section 151.060 is repugnant to the Constitution of

the United States in that it lays an undue burden upon or discriminates against interstate commerce in violation of the commerce clause, Article I, section 8, or deprives them of property without due process of law in violation of the Fourteenth Amendment because in such application it results in an assessment of railroad rolling stock for Missouri property taxation purposes greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

2. Whether the use by the Missouri State Tax Commission solely of a mileage ratio formula in assessing the value of the appellants' rolling stock for Missouri property tax purposes contravenes the Constitution of the United States by laying an undue burden upon or discriminating against interstate commerce in violation of the commerce clause, Article I, section 8, or by depriving these appellants of property without due process of law in violation of the Fourteenth Amendment because the use of the formula results in an assessment greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

STATEMENT

The appellants are interstate railroads. On October 16, 1964, appellant Norfolk & Western, with the approval of the Interstate Commerce Commission,² acquired all the properties of appellant Wabash under a long-term lease. (A. 5; Ex. 41; R. 23).

The Norfolk & Western, a Virginia corporation, has been and still is predominantly a coal-carrying railroad

² Norfolk & Western Ry. and New York, C. & St. L. R.R. Merger, 324 I.C.C. 1 (1964).

with operations centered in the eastern part of the country. Its coal traffic moves principally from mines in Virginia, West Virginia and Kentucky to the seaboard, the manufacturing centers of the East and steel mills in the Great Lakes area. Until the Norfolk & Western acquired the Wabash properties by lease and at the same time, in a related transaction, merged with the New York, Chicago & St. Louis Railroad Company, known as the Nickel Plate, its operations did not extend west of Cincinnati. (A. 15-16; Ex. 3; R. 43).

The Wabash is an Ohio corporation. At the time it leased all its properties to the Norfolk & Western, it was engaged in the carriage of general merchandise on a route that extended from Buffalo to Kansas City. It had approximately 620 miles of road in Missouri upon which it operated trains. (A. 11-15; Ex. 3; R. 43; Ex. 30; R. 13).

As lessee of all of the properties of the Wabash, the Norfolk & Western became liable for the ad valorem taxes on such property in Missouri and elsewhere. Subsequently, as of January 1, 1966, the Norfolk & Western purchased the Wabash rolling stock that it had previously leased. It continues to lease the Wabash's fixed property.⁸

The question in this case arises from the assessment by Missouri of the rolling stock of the combined rail-

⁸ By the terms of the lease the Norfolk & Western obligated itself to pay all taxes on the leased property. (Ex. 41, R. 23). By V.A.M.S. § 151.010 all property "owned, hired or leased by any railroad" is made subject to taxation. At one point in this proceeding appellants urged that the Wabash should be treated as a separate entity in the computation of the tax on its rolling stock. The point was abandoned and in any event would not be available to appellants in tax years following the outright purchase by the Norfolk & Western of the Wabash rolling stock.

roads for property tax purposes. Specifically at issue is the assessment for 1965, the year following the Norfolk & Western's lease of the Wabash properties. But the question recurs with each yearly assessment, since the Missouri State Tax Commission has followed the same method in assessing appellants' property in 1966 and 1967.

By the use of a mileage proportion, which is prescribed in its governing statute as a method of assessing an interstate railroad's rolling stock, the Tax Commission in 1965 assessed the rolling stock of appellants in Missouri at nearly \$20,000,000. This is almost three times the taxable value of the average amount of the carriers' rolling stock in Missouri at any relevant time and more than twice what the Wabash was assessed for rolling stock in the previous year, even though there had been no change of any consequence in the operations or in the number of locomotives and cars in Missouri. (See pp. 8-12, *infra*).

The method of assessment that the Tax Commission used is described in section 151.060(3) of the Missouri statutes, which provides that

"when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the . . . commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Acting pursuant to the statute, the Tax Commission first determined the value of all rolling stock owned or

leased by the Norfolk & Western as of the tax day, January 1, 1965. This determination was made by totaling the original cost, less accrued depreciation at 5 per cent a year up to 75 per cent of cost, of each locomotive, car and other piece of mobile equipment. A similar determination is made every year for every interstate railroad operating in Missouri.

The figure thus determined for the Norfolk & Western's entire fleet, \$513,309,877, was based solely on the appellants' data, which the Commission accepted without question. The Commission then applied to the total value a factor of 47 per cent, which was used by it as an "equalizing factor" for all railroads and utilities in 1965. The resulting figure, \$241,255,643, is what is termed the "depreciated, equalized value" of the Norfolk & Western's entire rolling stock. Property other than that of railroads and utilities is assessed in Missouri by local assessors at some fraction of its value, typically less than 47 per cent, and the equalization factor is intended to yield a comparable assessed value for railroad and utility property. The Commission found, again from data supplied by the appellants, that 8.2824 per cent of all the main and branch line road (excluding second tracks and side tracks) owned, leased or controlled by the Norfolk & Western was within Missouri. This percentage was applied to the overall depreciated, equalized rolling stock value. The resulting figure was \$19,981,757. Fixed property, which is valued without resort to the mileage formula, was assessed at \$12,177,597, and no question is raised concerning the assessment of such property. The Commission deducted from the sum of these two figures \$860,415, representing what it calls an "economic factor" that is allowed to all railroads

in varying amounts and that had been allowed to the Wabash in each of the three preceding years in exactly the same amount. Thus, the total assessed valuation was \$31,298,939. (A. 4-6, 52-57).

After notice was received of an assessment in this amount, the appellants filed with the Commission a request for adjustment and equalization of their assessment and asked for a hearing. They challenged the assessment of rolling stock (but not of fixed property) on state law grounds and also on the ground of its repugnance to the federal Constitution. (A. 6-9, 54). A hearing was held before the Commission, and the parties stipulated that the assessment was arrived at in the manner described above. (A. 4-6). Appellants then presented evidence in support of their position that, as applied in this case, the mileage proportion resulted in a valuation of rolling stock so grossly in excess of the value of rolling stock actually in Missouri at any relevant time as to violate the commerce and due process clauses. This evidence, which was in the form of testimony of two officials of the Norfolk & Western and largely statistical exhibits, was uncontradicted. It showed a gross disparity between the assessment made by the Commission and the value of the cars and locomotives owned or leased by the Norfolk & Western that on an average were in Missouri. Counsel for the Commission, taking the view that the statute permitted only the mechanical application of the mileage proportion, objected to most of appellants' evidence as irrelevant to the Commission's duty. (e.g., A. 9-10, 11-13, 25, 36-37, 39, 42).

One major part of appellants' case consisted of the results of studies of cars and locomotives actually in Missouri on January 1, 1965, and on random days in

1964. (See A. 38-50). One exhibit showed that, at 47 per cent of cost less accrued depreciation, i.e., valued in the same way as the Tax Commission valued the entire Norfolk & Western fleet, the rolling stock owned or leased by the Norfolk & Western actually in Missouri on January 1, 1965, was worth only \$7,628,297 rather than nearly \$20,000,000. (A. 40-42; Ex. 25; A. 40, 100). This is 3.16 per cent, not 8.2824 per cent, of the depreciated, equalized value of the Norfolk & Western fleet. The number of locomotives and cars in Missouri represented 2.71 per cent, not 8.2824 per cent, of the total units of Norfolk & Western rolling stock. (A. *Ibid*; Ex. 40; R. 23). Other exhibits in the series demonstrated that tax day was not atypical: On December 1, 1964, the depreciated, equalized value of rolling stock owned or leased by the Norfolk & Western in Missouri was \$7,192,575 (Ex. 29; A. 44, 104), and on other random days during 1964 prior to the lease—April 1, July 1, October 1—the figures for Wabash rolling stock were \$5,891,388, \$7,102,891 and \$7,268,464 (Exs. 26-28; A. 44, 101-03). The average of all five figures was \$7,014,723.

The great preponderance of the rolling stock that was in Missouri on January 1, 1965, both by units and by value, was that owned by the Wabash; no Norfolk & Western-owned locomotives, passenger cars or units of work equipment were in Missouri on that day. (A. 22-23; R. 90-91, 94-95). Some Norfolk & Western freight cars were in the state. They were few in number, however, and there was no increase in the number of cars owned by the Wabash, the Norfolk & Western, the Nickel Plate and the Pittsburgh & West Virginia Railway (whose roadbed and rolling stock were also leased by the Norfolk & Western effective October 16, 1964) on the Wabash's line in Missouri from the period before the Wabash lease became effective to the period

after it became effective. (Ex. 5; R. 54, 87; A. 26-27; Ex. 14; A. 26, 93).

This reflects the fact that the acquisition of the Wabash properties made no significant change in the operations of either the Norfolk & Western or the Wabash. The overall purpose of the acquisition, of the merger into the Norfolk & Western of the Nickel Plate, and of the lease of the properties of the Pittsburgh & West Virginia was more to diversify the business of the Norfolk & Western than to provide the opportunity for an integrated through movement of traffic. (A. 11-15). There was no change in rail operations in Missouri except that some Wabash cars were routed through Hannibal, Missouri, instead of St. Louis. The Wabash's general merchandise hauling business continued as before. (A. 15).

Prior to these transactions, the Norfolk & Western was unique among the railroads of the United States in its emphasis upon the carriage of coal. (A. 15-16). More coal is loaded on the line of the Norfolk & Western than on the line of any other railroad in the country. (A. 15). In 1964, 70 per cent of the Norfolk & Western's revenue was from coal traffic. (A. 15). The Norfolk & Western's fleet of rolling stock is therefore comprised very largely of equipment—special locomotives and hopper cars—that is used to carry coal from mines in Virginia, West Virginia and Kentucky to points on the eastern seaboard and the Great Lakes. Scarcely any of that equipment ever enters Missouri. None of the coal from the eastern states is destined for Missouri, and less than .003 of all Norfolk & Western shipments of coal from those states could even have gone through Missouri. (A. 28-30; Ex. 17; A. 29, 95).

In this coal mining region special locomotives, designed for pulling heavy coal trains on grades and equipped with dynamic brakes for handling those trains, are needed. Since locomotives today are used principally in combination, except on local trains, and since these special coal-hauling locomotives cannot be so used with the kind of locomotives owned by the Wabash, the Norfolk & Western's special locomotives are not used in Missouri. (A. 19-21, 23; Ex. 10; A. 21).

The Norfolk & Western owned as of tax day almost 100,000 freight cars, 63,989 of which were coal hopper cars. (Ex. 40; R. 23; Ex. 12; A. 24, 91; Ex. 18; A. 32, 96). These hopper cars were used, of course, primarily in the eastern coal mining regions. Only 163 of these hopper cars were in Missouri on tax day, either on the line of the Wabash or that of some other railroad. (A. 26-27; Ex. 14; A. 26, 93; Ex. 19; R. 89, A. 97). And tax day was not unusual in this respect, (*Ibid*). As pointed out above, scarcely any Norfolk & Western coal mined in Virginia, West Virginia or Kentucky is shipped to points west of the Mississippi. (P. 10, *supra*). Moreover, special rules of the Association of American Railroads issued under authority of the Interstate Commerce Commission require that Norfolk & Western hoppers that go off line east of the Mississippi be returned as promptly as possible to the coal mining regions of the East. This means that Norfolk & Western hoppers that are unloaded in the East cannot lawfully enter Missouri under the control of other railroads. (A. 17-18; Ex. 6; A. 17, 88).

The concentration of traffic and equipment in the East was reflected in the relative density of traffic in Missouri as against traffic over the entire Norfolk & Western system. There is a close relationship between

traffic density in a given area and the amount of rolling stock that on an average is present in that area. A study of traffic density, as measured by ton miles of freight per mile of road, showed that on the Wabash lines in Missouri traffic density was only 54 per cent of what it was on the Norfolk & Western system as a whole. (A. 36-38; Ex. 24; A. 51, 99).

Finally, the appellants showed that, if the Commission had applied the mileage proportion to the Wabash system and the Wabash properties rather than to the Norfolk & Western system and properties, the assessment would have been \$10,103,340. (A. 36). The assessment against the Wabash for rolling stock was \$9,177,683 the previous year. (A. 36). The assessment of fixed properties, which are assessed without regard to the mileage proportion, did not change significantly from 1964 to 1965, going from \$12,092,594 in the hands of the Wabash in 1964 to \$12,177,597 in the hands of the Norfolk & Western in 1965, (A. 5, 36).

The hearing at which the foregoing facts were brought out was held on June 23, 1965. The Commission on July 6 entered its decision making final the assessment it had originally proposed. (A. 57). The Commission first recited that it had applied the mileage proportion as described above. It then described its procedures; paraphrased appellants' contentions; made the irrelevant point that it valued the property of railroads and utilities differently from the way local assessors valued other property; paraphrased the applicable statutes, including the mileage proportion statute; asserted that the proportion is a constitutional means of getting at the value of the rolling stock of any interstate railroad in Missouri and was used

uniformly with respect to all interstate roads in Missouri, and finally stated the bare conclusion that appellants' evidence, which was nowhere discussed let alone analyzed, did not show that the assessment of its rolling stock "was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of [appellants]" (A. 52-57). Appellants, pursuant to Missouri procedure, filed in the Circuit Court of Cole County a petition for review. (A. 58-66). That court sustained the Tax Commission's assessment on the administrative record and did not render an opinion. (A. 66-67). On appeal, the Supreme Court of Missouri stated that the question was "whether Missouri's method, . . . valid on its face, meets the test of reasonable or fair and workable apportionment in its application to N & W in this case." (A. 78-79). The Supreme Court thought that its test was met because the evidence submitted by appellants did "not recognize any justified enhanced or augmented value to the portion [of rolling stock] actually in Missouri brought about by being merged into the entire N & W system." (A. 83).

SUMMARY OF ARGUMENT

I

An interstate enterprise is subject to taxation by a state other than its state of domicile on only that part of its property which is regularly within the state. In applying this proposition to the operating equipment of interstate carriers, this Court has declared that the state may tax only that fraction of equipment, although it may be ever-changing in content, that is habitually present within the state's borders. The mileage basis of apportioning rolling stock, used by Missouri here,

is one method of determining that fraction and has been sanctioned by this Court for use in certain circumstances. *E.g., Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). It assigns to the taxing state the percentage of the carrier's rolling stock that corresponds to the percentage of the carrier's track or road within the state; it rests, therefore, on the premise that "the rolling stock is substantially evenly divided throughout the railroad's entire system . . ." *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559, 562 (Mo. 1959). Where that premise fails as it did here, the mileage proportion cannot validly be used, for it results in unconstitutional taxation of out-of-state property.

II

In this case the premise for valid application of the mileage proportion failed because the rolling stock was concentrated much more heavily outside of Missouri than in it: (1) The assessment overstated by nearly 3 to 1 the value of the Norfolk & Western's fleet actually in Missouri on tax day and other representative dates; (2) traffic density, a reliable indicator of the presence of rolling stock, was much lower in Missouri than in the system as a whole; (3) the Norfolk & Western's lease of the Wabash properties did not substantially alter the operations of those properties in Missouri, since the heavy Norfolk & Western coal-hauling business in the eastern states did not materially affect Missouri traffic; (4) in the hands of the Wabash the rolling stock would have been assessed under the mileage proportion at only a little more than half of the actual assessment.

In these circumstances, when Missouri assessed the Norfolk & Western's rolling stock pursuant to the mileage proportion it was attempting to tax more than

\$12,000,000 of Norfolk & Western property that was regularly located outside the state. Such an attempt violates both the due process and commerce clauses, as this Court has held in similar cases dealing with mileage proportions. *E.g., Wallace v. Hines*, 253 U.S. 66 (1920); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919); *Fargo v. Hart*, 193 U.S. 490 (1904). Cf. *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927). These cases are of unquestioned authority, reflecting as they do the common-sense proposition that the mileage proportion will yield an irrational result when the premise of a proportionately even distribution of property within and without the taxing jurisdiction does not accord with the facts. The Court has recognized since 1874 that a tax applied to property values developed from application of a mileage proportion whose premise fails as it has in this case "must necessarily fall upon property out of the State." *The Delaware Railroad Tax*, 18 Wall. 206 (1874). And this is forbidden by the Constitution.

III

The principal ground on which the court below rationalized the assessment was that the rolling stock in Missouri had an "enhanced or augmented value" by reason of its inclusion in the larger Norfolk & Western system. This rationale is a misconception of the doctrine, recognized in many decisions of the Court, that a state may tax its fair share of the whole value of an enterprise, even though that share is greater than the value that would be ascribed to tangible assets in the state under a method of assessment that did not have regard to the unitary value of the enterprise. There is nothing in this concept of enhancement that allows a state to do what Missouri did here—to inflate the percentage of the enterprise that it can tax.

The Missouri Supreme Court failed to distinguish its taxing scheme from those of other states that use a mileage proportion to allocate a part of the whole value of interstate enterprises. The Missouri statute, as applied here, is meant only to determine the value of rolling stock as an aggregate of individual units and to allocate to the state a part of that value. The fleet of the Norfolk & Western, like that of all other railroads, was valued at original cost less depreciation; therefore, no enhancement for unitary enterprise value, if any such value existed, was taken into account. The Missouri statute as administered thus differs from the statutes before this Court when it has spoken of enhancement, because those statutes utilized gross receipts, net income or capitalization to value tangible assets. Missouri does not, however, ignore enterprise values; it reaches such values under a franchise tax statute, not here in issue.

Furthermore, even if the railroad property tax statute were also meant to reach enhanced values, it would not be saved in its application in this case. This Court has condemned the use of a mileage proportion to attribute to a state more value than the facts show can fairly be attributed to it in cases where the total value to which the mileage proportion was applied represented total enterprise, or "enhanced," value. *Wallace v. Hines*, 253 U.S. 66 (1920); *Fargo v. Hart*, 193 U.S. 490 (1904). Finally, another condition for finding enhancement of value—a showing in a "plain and fairly intelligible way that [out-of-state property] adds to the value of the road . . . in the state," *Wallace v. Hines*, *supra* at 69—was not satisfied here, since the coal-hauling operations of the Norfolk & Western did not contribute significantly to the value of property in Missouri.

IV

The nearly 3 to 1 discrepancy between the Missouri assessment and the actual taxable value of rolling stock present in Missouri was enough to satisfy this Court's requirement that a taxpayer prove an assessment to be "grossly excessive." *Norfolk & Western Ry. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, 685 (1936). The Missouri Supreme Court's view that the assessment was not grossly excessive will not withstand analysis, for that view rested principally upon a comparison of the proportion of the rolling stock value assessed here with a past assessment against the Wabash. This comparison is meaningless since it deals with assessed values in Missouri in relation to total system values rather than in relation to the actual value of rolling stock habitually present within the state.

There is no substance to other grounds on which the court below sought to sustain the questioned assessment, i.e., that factors other than the mileage proportion were considered and that the Tax Commission may not have believed appellants' evidence. The Tax Commission explicitly followed the mileage proportion mode of assessment in a mechanical manner and adopted to the dollar the result yielded by that course. It took no other factors into account. The suggestion that the Commission may have disbelieved appellants' evidence is fanciful. The witnesses were scarcely cross-questioned, there was no countervailing proof, and the evidence was statistical and therefore subject to ready verification. Indeed, it was similar to the evidence upon which the Commission admittedly relied in making the assessment. In short, appellants' evidence was the "clear and cogent evidence" that this Court has held necessary to invalidate an apportionment. *Butler*

Bros. v. McColgan, 315 U.S. 501, 507 (1942). The Commission ignored this evidence, regarding it as irrelevant to the Commission's duty of mechanically applying the mileage proportion. Since constitutional rights are at issue here, this Court is bound to determine what in fact the Tax Commission did below, notwithstanding the state court's attempted explanations.

V

During its long history the mileage proportion used by Missouri here has been recognized to be both inaccurate and unfair. As a consequence, very few states—indeed only a few of those in which the Norfolk & Western operates—continue to use a mileage proportion without modification. Thus, there is no merit to the appellees' argument that railroads, including the Norfolk & Western, would not be prejudiced if every state used a mileage proportion. Since most states have adopted formulas that give some weight to traffic density, the assessment here, if allowed to stand, would result in double taxation of the values not fairly attributable to Missouri. Furthermore, there is an additional risk of double taxation as a result of the power of a state of domicile to tax all rolling stock except rolling stock shown to be habitually present in some particular other state. *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962).

The only burden placed upon the Tax Commission by a judgment of reversal would be a requirement that it consider and evaluate fairly the appellants' evidence and make such adjustments in its assessment as that evidence requires. The Tax Commission need not actually count the cars and locomotives of the Norfolk & Western in Missouri on a particular day,

but when confronted with the results of such a count, it must take those results into account in its assessment when they differ as drastically as they did here from the formula assessment.

ARGUMENT

I. A MILEAGE PROPORTION CAN VALIDLY BE APPLIED TO ASSESS PROPERTY OF AN INTERSTATE RAILROAD ONLY WHEN IT DOES NOT RESULT IN THE ASSESSMENT AND TAXATION OF PROPERTY OUTSIDE THE STATE OR A DISPROPORTIONATE TAX BURDEN ON INTERSTATE COMMERCE.

Missouri unquestionably has power to tax the property of the Norfolk & Western, including its rolling stock, that is regularly within the state's borders even though the property is used in interstate commerce and even though the Norfolk & Western is not domiciled in Missouri. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Marye v. Baltimore & O.R.R.*, 127 U.S. 117 (1888). That power is not challenged here. But just as unquestionably Missouri does not have power either to tax property of the Norfolk & Western that is outside the state or to lay a disproportionately large tax upon the Norfolk & Western because of its out-of-state operations. *Fargo v. Hart*, 193 U.S. 490, 499, 502 (1904). It is our contention that Missouri in this case has attempted to do just that by subjecting to its taxing power millions of dollars worth of rolling stock that was not in Missouri and had no taxable relationship to Missouri.

Rolling stock, being constantly on the move, poses a problem for states that attempt to tax it ad valorem; many of the cars and locomotives of the usual interstate railroad are not permanently in any one state. The problem and the constitutional solution were limned

by Mr. Justice Douglas, concurring in *Braniff Airways v. Nebraska State Bd.*, 347 U.S. 590, 603 (1954) :

"Property in transit . . . is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem."

The Missouri statutory provisions that were applied to the Norfolk & Western's tangible property in this case represent an effort to get at "the fraction" of the Norfolk & Western's rolling stock regularly and continuously in Missouri by means of a mileage proportion—a device that this Court has sanctioned, *Pullman's Palace Car Co. v. Pennsylvania, supra*, but only under circumstances that were not present here.⁴

Every railroad operating in Missouri is directed to report each year to the State Tax Commission its fixed property in Missouri and the number and value of its locomotives, cars and other items of movable property wherever located. V.A.M.S. § 151.020. On the basis of these reports and such other information as it may call for or otherwise possess, the Commission is directed to assess the railroad's tangible property in Missouri. V.A.M.S. § 151.060(1). In its assessment of the rolling stock portion of that property, the Commission is limited to a proportion of the total value of the carrier's rolling stock that corresponds to the ratio of road mileage in Missouri to the total road mileage of the railroad. V.A.M.S. § 151.060(3).

The propriety of using a mileage proportion as an index to the quantity and therefore the value of rolling

⁴ See also *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102 (1934); *Wells Fargo & Co. v. Nevada*, 248 U.S. 165 (1918); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897).

stock in Missouri rests on the premise, as the Missouri Supreme Court has stated, that "the rolling stock is substantially evenly divided throughout the railroad's entire system, and the percentage of all units which are located in Missouri at any given time, or for any given period of time, will be substantially the same as the percentage of all the miles of the railroad located in Missouri." *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559, 562 (Mo. 1959).⁵ Where that premise is valid, the statute accomplishes what it was meant to accomplish, for it then taxes only rolling stock that is regularly inside Missouri.

Where the premise fails as it has here, an attempt to apply the mileage proportion results in an unconstitutional tax on property outside the state's borders. The unconstitutionality of such an attempt is established by repeated decisions of this Court, beginning with a very pointed dictum in *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 431 (1894), and continuing with holdings in *Fargo v. Hart*, 193 U.S. 490 (1904), *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), *Wallace v. Hines*, 253 U.S. 66 (1920), and *cf. Southern Ry. v. Kentucky*, 274 U.S. 76 (1927), and with declarations of the principle in *Illinois Cent. R. R. v. Greene*, 244 U.S. 555, 562-63 (1917), *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934), and *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365-66 (1940). The failure of the premise and the constitutional consequence of that failure are detailed in part II of this Brief, *infra*.

⁵ The statement of the premise for the use of the mileage proportion was quoted in the opinion below. (A. 80). This Court too has held that the validity of a mileage proportion depends upon a roughly even distribution of property throughout a railroad's system. *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934); *Fargo v. Hart*, 193 U.S. 490, 500 (1904).

II. THE MILEAGE FORMULA IS UNCONSTITUTIONAL IN ITS APPLICATION TO THE NORFOLK & WESTERN IN THIS CASE BECAUSE IT BRINGS ONTO MISSOURI'S TAX ROLLS PROPERTY NOT PRESENT IN MISSOURI.

A. The Record Demonstrates a Gross Disparity Between the Value of Norfolk & Western Rolling Stock Actually in Missouri and the Tax Commission's Assessment, as Well as a Lack of Relationship of Rolling Stock Values Appropriated by Missouri To Operations of the Carrier in That State.

In this case the premise for valid application of the mileage proportion to the Norfolk & Western's rolling stock clearly did fail. The appellees do not dispute the fact that the rolling stock owned or leased by the Norfolk & Western was not evenly distributed throughout the railroad's system but was much more heavily concentrated outside Missouri. Moreover, the rolling stock concentrated elsewhere made no contribution to the value of property in Missouri. This we have demonstrated in our discussion of the uncontroverted evidence submitted by the appellants to the Missouri Tax Commission. (See pp. 8-12, *supra*). To summarize:

1. The Tax Commission's assessment was of 8.2824 per cent of the value of the Norfolk & Western's fleet. On tax day only 2.71 per cent of that fleet by units, and 3.16 per cent of it by value, was in Missouri. And tax day was representative of the taxable presence of appellants' rolling stock in Missouri throughout the preceding year. Putting the matter in other terms, the assessment of rolling stock was \$19,981,757; on a similar basis of valuation the average value of rolling stock in Missouri on random days, including tax day, was \$7,014,723. This disparity approaches 3 to 1.

2. The average mile of track in Missouri was responsible for only slightly more than half of the

• traffic of the average mile of track in the system. Thus, the Missouri road was much less densely populated with cars and locomotives than the system as a whole.

3. After all the Wabash properties were leased to the Norfolk & Western, the operations in Missouri continued in much the same way as they had under Wabash management. The Norfolk & Western's business, heavily weighted with the carriage of coal in the eastern part of the United States, continued as it had and did not significantly affect the Missouri operations of the leased Wabash properties. No Norfolk & Western locomotives and very few of its coal hopper cars were in Missouri at any relevant time.

4. In the year before the lease much the same rolling stock of the Wabash as was covered by the 1965 assessment had been assessed at only a little more than \$9,000,000, rather than nearly \$20,000,000. If the mileage proportion had been applied to the Wabash system alone, rather than to the whole of the Norfolk & Western properties, the post-lease 1965 assessment would have been only slightly more than \$10,000,000.

B. Under the Consistent Rulings of This Court the Application of the Mileage Proportion in This Case Is Invalid Under the Commerce and Due Process Clauses.

When Missouri assessed 8.2824 per cent of the Norfolk & Western's rolling stock, despite the fact that only 2.71 per cent of the total Norfolk & Western units and 3.16 per cent of the value of the entire Norfolk & Western fleet was in the state, it was attempting to tax more than 5 per cent of the railroad's rolling stock that was regularly located outside Missouri. This comes to more than \$12,000,000 of out-of-state property (at Missouri's assessed value) that the state has placed on its tax rolls.

It is a fundamental principle of constitutional law that the imposition of a tax on out-of-state property violates the due process clause of the Fourteenth Amendment. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954); *Greenough v. Tax Assessors*, 331 U.S. 486, 491 (1947). Cf. *American Oil Co. v. Neill*, 380 U.S. 451 (1965). It is also clear that "the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar." *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967). See also *Central R.R. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949). Under the test for determining whether state action is permissible under the commerce clause, the Missouri assessment scheme also falls, for it lays an unlawful burden on and discriminates against interstate commerce. This is demonstrable by a comparison of how the Missouri assessment scheme, as interpreted by the State Tax Commission in this case, would operate upon an interstate railroad with high traffic density in Missouri and low traffic density elsewhere. The rolling stock of such a railroad would be assessed at an amount less than the value of rolling stock actually in the state. In contrast, roads like the Norfolk & Western with low Missouri traffic density are taxed on their out-of-state property and therefore are discriminated against merely because they have a disproportionately large amount of out-of-state traffic. A clearer burden on interstate commerce is difficult to imagine. See *Nippert v. Richmond*, 327 U.S. 416, 431-34 (1946). See also *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 45, 48 (1940); *Halliburton Oil Well Cement Co. v. Reily*, 373 U.S. 64 (1963).

The principles of the above-cited decisions have been applied to invalidate over-assessments resulting from application of mileage proportions similar to Missouri's. *Wallace v. Hines*, 253 U.S. 66 (1920); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919); *Fargo v. Hart*, 193 U.S. 490 (1904).⁶ Indeed, in a decision that pre-dates these three the Court described the very facts of the present litigation as one of the "exceptional cases" in which the mileage proportion, then recently held valid on its face in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891), could not validly be applied:

"[I]n certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock." *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 431 (1894).

In the earliest of the cases invalidating state assessments, *Fargo v. Hart*, *supra*, the Court found that by using a mileage proportion the state had taken into account out-of-state property that contributed nothing to the value of property within the state—much as the Norfolk & Western's coal-hauling equipment was taken into account here. Mr. Justice Holmes, who spoke for the Court, took the occasion to expand upon the dictum of the *Backus* case and made it clear that a general principle underlay what the Court had said there about "exceptional cases." The principle was that the mileage proportion depends, as we have noted above, on the assumption "that the different parts of a line are about equal in value," and where that is not so the result of taxing according to a mileage proportion is to tax property outside the state. 193 U.S. at 500. The

⁶ See also *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927).

Court was dealing, significantly, with a statute that had been upheld in *American Express Co. v. Indiana*, 165 U.S. 255 (1897). It nevertheless condemned the particular assessment that was at issue as "an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States." 193 U.S. at 502.

In the *Union Tank Line* case a mileage proportion (based upon miles of track over which cars were run in the taxing state and throughout the country) was applied to the rolling stock of a company that rented tank cars to shippers. The showing of the tank car company was quite like that of the appellants here—a demonstration of a marked discrepancy between the assessment yielded by application of the mileage proportion to the aggregate value of a fleet of cars and the value of the average number of cars in the state. The Court held "that to permit enforcement of the proposed tax would deprive [the tank car company] of property without due process of law and also unduly burden interstate commerce." 249 U.S. at 283.⁷

⁷ In *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), the Court, over a dissent, discounted as a dictum and disapproved what had been said in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891), as to the general validity of mileage proportions. Any intimation that the *Pullman* case had been overruled was dispelled by *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), if not earlier. See *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940). But *Union Tank Line* remains authority for the more limited proposition for which appellants contend here. Indeed, the Missouri Supreme Court has recently recognized it as such. *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559, 561 (1959). See also Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 991-92 (1962).

In *Wallace v. Hines, supra*, under a North Dakota statute the ratio of a railroad's North Dakota main track mileage to total main track mileage was applied to the value of its stocks and bonds. The Court held, on an appeal from the grant of a preliminary injunction, that on the allegations of the railroad's complaint "the circumstances are such as to make that mode of assessment indefensible." 253 U.S. at 69. There were two reasons. One was that the alleged facts belied the necessary assumption that every mile of North Dakota track had approximately the same value as every other mile of the railroad's system. The other was that it appeared, again as in the present case, that the state had taken into account very large amounts of values that did "not affect the North Dakota part of the road." *Id.* at 70.

Southern Ry. v. Kentucky, 274 U.S. 76 (1927), like the preceding cases, struck down an overassessment resulting from the application of a mileage proportion. Kentucky computed its franchise tax by capitalizing the net operating income of railroads and by allocating to the state the percentage of that capitalized sum that corresponded to the percentage of the railroad's trackage within the state. The taxpayer, however, proved that the average net operating income per mile of track in Kentucky was much less than on the system as a whole, much as the Norfolk & Western proved here that the concentration of its rolling stock in Missouri was much less than on its system as a whole. The conclusion of the Court is therefore particularly relevant here:

"[A]s the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount ad-

judged . . . was arbitrarily excessive and included values of system property beyond the limits of Kentucky." 274 U.S. at 84.

The authority of this line of cases is unimpaired. In *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 175 (1949), where the sanction given for the use in proper circumstances of a mileage proportion to allocate railroad property was extended to vessels on inland waterways, the Court was at pains to note that the Attorney General of the taxing state had represented that the state statute "was intended to cover and actually covers here, an average portion of property permanently within the state . . ." In *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934), the Court declared, citing *Fargo v. Hart*, *Wallace v. Hines* and the *Union Tank Line* case:

"Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measurement for apportionment must be condemned as arbitrary."

See also *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365-66 (1940).

The fact is that mileage proportion assessments have been sustained only in cases like *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, and *Pullman Co. v. Richardson*, 261 U.S. 330 (1923), where the challenge was to the very use of the mileage proportion without regard to its fairness in the particular case; or, like *Nashville*,

C. & St. L. Ry. v. Browning, supra,⁸ and *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897); where there was no record of exceptional circumstances such as would debar the state from use of the formula; or, like *Rowley v. Chicago & N.W. Ry.*, *supra*, and *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421 (1894), where factors other than the mileage ratio, which by itself would have yielded an arbitrary result, were considered.

In short, the mileage proportion has the advantage of simplicity of application, but simplicity is not always enough where the problem, that of allocating to a state taxable values of an interstate enterprise, is a difficult one to whose solutions exacting constitutional standards are applied. *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 561-62 (1965). The common sense of the matter is that a mileage proportion may or may not achieve "the essential aim" of a state assessment statute, which is to ascertain "real values . . . of property within a State, . . ." *Union Tank Line Co. v. Wright, supra* at 283. It will do so only when the conditions on which it is premised prevail. When those conditions do not prevail, when rolling stock is heavily concentrated outside the taxing state, the statutory mileage proportion is unconstitutional in its application.

This common-sense point was seen by the Court even before the *Pullman Car* case was decided. In *The Delaware Railroad Tax*, 18 Wall. 206 (1874), a state taxed a domiciliary railroad upon a percentage of its stock determined by the ratio of in-state railroad mileage to total mileage. The ratio of the value of the railroad's property in the state to the value of all

⁸ See *Nashville, C. & St. L. Ry. v. Browning*, 140 S.W.2d 781, 786 (Tenn. 1939).

its property was less than the mileage ratio. While the tax was sustained as that of a state upon a domiciliary corporation, the Court said that, if the tax were regarded as a tax on the railroad's property, as was assumed by the state in argument, it "must necessarily fall upon property out of the State," and—a polite understatement—"there would be difficulty in sustaining the tax." *Id.* at 231. Without more the principle of this nearly century-old precedent, confirmed by repeated decisions over the years, compels reversal of the judgment below.

III. THE DECISION BELOW CANNOT BE SUSTAINED ON THE GROUND THAT IT MERELY RECOGNIZED AN ENHANCED OR AUGMENTED VALUE OF THE ROLLING STOCK.

The court below recognized the authorities we have just discussed and the arguments based on them. It sought to distinguish them with the unexplained statement that what was done here "is not like the situations presented in" this Court's decisions invalidating mileage proportion assessments. (A. 84). Without elaboration, this scarcely seems an adequate answer, and indeed it was not the court's primary answer.

Principally, the court sought to meet these arguments by declaring that Missouri's assessment of the appellants' rolling stock at nearly \$20,000,000 while only a little more than \$7,000,000 of such rolling stock was in the state on an average day during the relevant year was justified by the fact that "the portion actually in Missouri" had an "enhanced or augmented value . . . by being merged into the entire N&W system." (A. 83). It also spoke of a theory, said to underlie the mileage ratio method of assessment, "that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because

of its connection with, an integrated operational whole" (A. 79). The appellees have taken up this theme in their motion to dismiss or affirm.

Appellees, as did the court below, dwell at length on enhancement. The fact remains, however, that there is no support either in logic or in authority for the proposition that a state can allocate to itself for tax purposes 8 per cent of an enterprise's property, when only 3 per cent of that property is within the state, on the ground that it merely recognizes the enhanced value of the property within the state caused by its being part of a larger, interstate whole. The court below failed to appreciate this point because it misconceived on several scores the idea of enhancement of value by reason of unity of operation.

One fundamental misconception of the court below related to the kind of taxing statute to which the idea of enhancement is relevant. There are at least two reasons that states assess railroads and other carriers by various formulas rather than by physical valuation. One is to provide a simplified means of determining how much of a carrier's rolling stock is actually in the state and therefore taxable by it. That is the reason for and purpose of the Missouri mileage proportion statute as it has been administered by the State Tax Commission in this and other cases. Enhancement of value, as that idea has been expressed by this Court, is not relevant to such a statute.

The other reason for taxation by formula is to insure that the state subjects to its taxing power its share of the full value of the carrier as a going concern. A simple example, which led to considerable litigation in this Court near the turn of the century,

is that of a tax upon express companies.⁹ An express company does not usually have much physical property compared to the volume of its business. Yet, its activities in a state may contribute so much to the entire value of its business that the state is warranted in taxing a substantial part of the total value of the business. See *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220-21 (1897). Thus, statutes were enacted providing for assessing the capital value of express companies according to formulas, including mileage ratios, that purported to measure the proportion of the companies' activities in the state. *Id.* at 221. This mode of assessment allowed the states to get at the going concern values of express companies and thus to tax more than the value of their tangibles in the state, considered as separate items of property.

Mileage proportions have been applied to all of a railroad or a telegraph company's properties, including fixed property, *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421 (1894); to its capital stock, *Western Union Tel. Co. v. Massachusetts*, 125 U.S. 530 (1888); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); and even to its net income, *Norfolk & Western Ry. v. North Carolina ex rel. Maxwell*, 297 U.S. 682 (1936).¹⁰ And they have also been applied to aid in the valuation of rolling stock according to

⁹ See *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897); *American Express Co. v. Indiana*, 165 U.S. 255 (1897); *Adams Express Co. v. Kentucky*, 166 U.S. 171 (1897); *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185 (1897).

¹⁰ In *Norfolk & Western Ry. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, 685 (1936), the Court said that "mileage may have at times a relation to a tax upon net income which it may not bear to a property tax or even to one upon the value of a franchise."

its revenue-producing ability, as measured by gross receipts. *Pullman Co. v. Richardson*, 261 U.S. 330 (1923). A statute using a mileage proportion in any of these ways has a purpose beyond that of merely determining what rolling stock can be attributed to the state, and is aimed at reaching a part of the full value of an enterprise. Such statutes have been approved by this Court when the results they yielded fairly corresponded to the value of the taxpayer's property in the state, i.e., where the values associated with a mile of track were about equal within and without the state. In these situations the state uses a method of valuation or chooses a subject or measure for an apportioned tax that accurately reflects the value of property enhanced or augmented, as this Court has put it, by reason of its being part of an integrated interstate enterprise. E.g., *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959); *Pullman Co. v. Richardson*, 261 U.S. 330, 338 (1923); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450 (1918); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220-26 (1897); *Cleveland, C.C. & St. L. Ry. v. Backus*, 154 U.S. 439, 445-46 (1894).

This Court long ago recognized the distinction between the kind of statute to which the Court was addressing itself in these cases, where there are enhanced values; and an ordinary statute for assessing and taxing tangible property:

"A distinction must be noticed between the construction of a state law and the power of a State. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the State comprehends all property in its

scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value." *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 221 (1897).

The Missouri taxing statutes that are involved here, as administered by the State Tax Commission, plainly focus upon "horses and wagons." Indeed, the procedures of the Tax Commission do not provide any means whereby any enhanced value, even of rolling stock alone, resulting from its inclusion in a unitary railroad enterprise is or, indeed, can be determined. The point where enhancement or augmentation might enter, if at all, is the point at which the entire fleet of rolling stock is valued before the mileage proportion is applied. If any enhanced or augmented value were to be recognized at that point, techniques different from those that the State Tax Commission used would have to be employed. The statute requires from each railroad a statement showing the total number of units of rolling stock "and the actual cash value thereof." V.A.M.S. § 151.020. Pursuant to this provision, the Commission requires and the appellants (and all other railroads operating in Missouri) supplied data showing units of rolling stock, their cost, and their age so that allowable depreciation could be computed. The Tax Commission merely took the figures supplied by the appellants, and "as in all other railroad assessments" it then took "the original cost of the equipment by the year of acquisition and allow[ed] five percent depreciation per year but with a maximum depreciation of Seventy-five per cent of original cost," to arrive at the value of the Norfolk & Western's entire complement of rolling stock. (A. 53). The Commission then applied the mileage pro-

portion to this value. This process of valuation and allocation at no stage takes account of going concern or other "enhanced" values.

Moreover, there is no reason to doubt that in so administering its governing statute the Tax Commission has correctly construed it. A prime indication that the property tax statute is not intended to reach Missouri's share of the full value of railroads lies in the fact that only rolling stock and not fixed property is allocated to the state by the mileage proportion. This suggests the limited purpose of determining the quantity and thus the value of rolling stock in Missouri. Values associated with the status of a railroad or other business as a unitary enterprise or going concern are otherwise taxed in Missouri. They are reached by the franchise tax provided for in section 147.010 of the Missouri statutes.¹¹ This provision requires every corporation organized or doing business in Missouri to pay annually a tax on the same proportion of the cor-

¹¹ Under prior statutes the Missouri taxing authorities had assessed the franchise or going concern value of railroads. But that was under provisions specifically authorizing the assessment and taxation of franchises and of "all other property" or "any other property" of railroads. Mo. R.S. 1939 §§ 11240-41, 11248. See State ex rel. Hagerman v. St. Louis & E. St. L. Elec. Ry., 279 Mo. 616, 216 S.W. 763 (1919), *aff'd*, 256 U.S. 314 (1921); State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 622, 106 S.W. 1005 (1907). Those provisions were repealed when chapter 151 was enacted in its present form in 1945. Mo. Laws 1945, pp. 1825, 1901. The present statute was made to govern the manner of assessing and taxing railroads' "real property, and tangible personal property." V.A.M.S. § 151.010. Such property is returned by a railroad under V.A.M.S. § 151.020, and § 151.060 authorizes the Tax Commission to assess property so returned and "any other tangible property"—not "all other" or "any other property" as under previous law.

poration's capital stock plus surplus that its assets inside the state bear to its total assets. Since it acquired the Wabash properties by lease, section 147.010 has been applied to the Norfolk & Western.¹²

Thus, when the Missouri Supreme Court spoke of enhanced values it was attempting to justify the irrational result the Tax Commission obtained in applying a statute to which the concept of enhanced value is foreign. In its references the court utterly misconceived what this Court has meant when it has talked about enhanced value. This can be shown by a discussion of the case the Missouri Supreme Court cited for the key statement of its understanding of the enhanced value theory—*Pullman Co. v. Richardson*, 261

¹² The Missouri Supreme Court has upheld the application of the franchise tax statute to railroads on precisely the same rationale that this Court used in deciding one of the leading cases on enhancement of value, *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897). See, e.g., *State ex rel. Missouri Pac. R.R. v. Danuser*, 319 Mo. 799, 6 S.W.2d 907 (1928), cert. denied, 278 U.S. 631 (1928); *State ex rel. Wabash Ry. v. Williams*, 284 Mo. 456, 224 S.W. 822 (1920).

From the time the franchise tax statute generally applicable to corporations was enacted in 1917 until chapter 151 took its present form in 1945, there seems to have been the possibility in Missouri of double taxation of the enterprise value of railroads. Indeed, one point in a challenge to the franchise tax statute of 1917 that came to this Court and was rejected, *St. Louis-San Francisco Ry. v. Middlekamp*, 256 U.S. 226 (1921), was that the statute resulted in double taxation. See 65 L. Ed. at 907. Oddly, on the same day that the *Middlekamp* case was decided, the Court also handed down its opinion in *St. Louis & E. St. L. Elec. Ry. v. Missouri ex rel. Hagerman*, 256 U.S. 314 (1921), rejecting a constitutional challenge to an assessment under the special Missouri tax on railroad franchises of a part, determined fairly according to a mileage proportion, of the going concern value of a street railroad that operated over a bridge crossing the Mississippi River.

U.S. 330 (1923).¹³ That case involved a tax on the property of the Pullman Company measured by gross receipts. In explaining that gross receipts was a proper measure of such a tax the Court made a comment, quoted by the court below, that a state has the power to make a tax "cover the enhanced value which comes to the property in the State through its organic relation to the system." *Id.* at 338. See also *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 455-56 (1918); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220-26 (1897). But the references to "organic" or "real values" or the like in these and similar cases were obviously directed to determining the value of property to be allocated and not to allocation of values.¹⁴ Valuation and allocation are quite different things, and neither in *Pullman* nor in any other case has this Court indicated that its concept of enhancement is relevant to the latter.

¹³ "The theory underlying such method of assessment is that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole and may, therefore, be taxed according to its value 'as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system.' *Pullman Co. v. Richardson*, 261 U.S. 330, 338." (A. 79).

¹⁴ See *Railway Express Agency v. Virginia*, 358 U.S. 434, 436, 441-42 (1959); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 109 (1934); *Great Northern Ry. v. Minnesota*, 278 U.S. 503, 508-09 (1929); *Southern Ry. v. Kentucky*, 274 U.S. 76, 81-82 (1927); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 282-83 (1919); *U.S. Express Co. v. Minnesota*, 223 U.S. 335, 347 (1912); *Fargo v. Hart*, 193 U.S. 490, 498-99 (1904); *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 428-29 (1894); *State Railroad Tax Cases*, 92 U.S. 575, 608, 611 (1876).

To explain the consequences of the Tax Commission's application of the mileage proportion in this case on the basis of "enhancement" is to confuse the two ideas of valuation and allocation. The court below misapplied the concept of enhancement, which can be considered only at the stage where value is found, to explain what happened in the allocation of values already found. But the fact is that the amount of the assessment against the Norfolk & Western for rolling stock was inflated, not because of any enhancement of value, but because of the failure of what the court below itself recognized was the necessary premise for a rational result under a mileage proportion—the even distribution of rolling stock throughout the railroad's entire system. (See pp. 20-21, *supra*). Thus, on the Missouri Supreme Court's theory only those railroads for which application of the mileage proportion to rolling stock yields inflated and unrealistic values, i.e., railroads with proportionately more rolling stock outside the state than within it, are to be charged with any enhanced, unitary enterprise value. This is a blatant discrimination against and burden upon the interstate commerce of such roads. (See p. 24, *supra*).

Even if, therefore, chapter 151 were meant somehow to reach the enhancement of value of rolling stock associated with its being used in the interstate Norfolk & Western system, that fact would not change the proper result of this appeal. The idea of enhancement has never been regarded as a justification for a taxing state's taking into its assessment a portion of total system value that does not correspond to the value that the facts show can fairly be attributed to it. See *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927). Both *Fargo v. Hart*, 193 U.S. 490 (1904), and *Wallace v. Hines*, 253

U.S. 66 (1920), were cases in which the subject or the measure of the tax was the capital value of the entire railroad. The fact that enhancement of value arising from the organic unity of an interstate enterprise was thus incorporated in the measure of value, contrary to the Missouri practice here, did not prevent the Court from holding that mileage proportions produced unconstitutional results. As the Court said in *Fargo v. Hart, supra* at 499-500:

"The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. . . .

"It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense."

The fact that *Fargo v. Hart* and *Wallace v. Hines* both involved mileage proportions that were applied to the whole value of the taxpayer makes them *a fortiori* precedents for the present case. Greater leeway may be allowable in the application of formulas that are designed to allocate entire enterprise values. In the first place, these values include intangibles, which by

their very nature are more difficult to allocate than tangibles. See *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940); Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 994 (1962). Secondly, a mileage proportion for measuring the percentage of the total property of a railroad or telegraph company within a state embodies a direct measure of value for a substantial part of the company's in-state assets, *i.e.*, its roadbed or telegraph lines. There is, on the other hand, no such direct measure of value when only rolling stock is allocated by means of a road or track mileage proportion.

Moreover, it is as clear in this case as it was in *Fargo v. Hart* and *Wallace v. Hines* that the out-of-state values that the court below said "enhanced" Missouri values did not affect those values. The Norfolk & Western's coal-hauling equipment, accounting for the greatest part of its rolling stock value, operated independently of the operations of the Wabash lines in Missouri. The rule is that "no property of . . . an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace v. Hines, supra* at 69. It is no answer to speculate, as the court below did, upon the motives of the parties to the lease. (A. 83-84). No doubt it was thought that a stronger enterprise would result from the lease and related transactions, but an enterprise may be stronger for greater diversity rather than for any integration of operations. The size and resources of the Norfolk & Western, divorced from the Missouri operations, were not relevant to the value of what was used in those operations.

**IV. THE OTHER GROUNDS ASSIGNED BY THE COURT BELOW
FOR SUSTAINING THE ASSESSMENT ARE LACKING IN
SUBSTANCE.**

**A. The Assessment Was "Grossly Excessive" by Any
Rational Standard.**

The court below and appellees here defend what was done to the Norfolk & Western on the further ground that the exaggeration of the value of its Missouri rolling stock by the Tax Commission is not so "grossly excessive" as to call for invalidation.

Where what is involved is not "a mere case of overvaluation, but . . . an assessment made upon unconstitutional principles," *Fargo v. Hart*, 193 U.S. 490, 502 (1904), not much is to be gained by comparisons with the discrepancies in value shown by the facts of other cases. We submit, however, that the requirement of showing a "burden on the taxpayer grossly in excess of the results of a more accurate apportionment," *Norfolk & Western Ry. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, 685 (1936), is satisfied where the disparity between the amount assessed and the amount resulting from "a more accurate apportionment" approaches 3 to 1 as it does here. Such a discrepancy is far more than what must be accepted by taxpayers in recognition of the fact that an allocation "can never be made for a unitary business with more than approximate correctness." *Id.* at 684.

The Missouri Supreme Court has tried to belittle the excessiveness of the assessment of the Norfolk & Western's rolling stock by a comparison that, upon analysis, would be relevant only if Missouri were permitted by the Constitution to tax values outside its borders. In its opinion the court said that the depreciated value of all Wabash rolling stock is \$82,000,000

as compared with \$241,000,000 for all Norfolk & Western rolling stock and that if a mileage proportion had been taken of the Wabash rolling stock alone (based on the Wabash's Missouri and system mileage), the assessment would have been \$10,103,340.¹⁵ The court concluded from this venture into arithmetic that "certainly, no unconstitutional disproportion is revealed in an assessment of \$19,981,757 against a total valuation of \$241,255,643, when compared to \$10,103,340 assessed against \$82,456,813. . ." (A. 84-85). To the contrary. If, as was the case here, the values represented in the difference between \$82,000,000 and \$241,000,000 were substantially all outside Missouri and contributed nothing to the value of what was within the state the disproportion in assessments is almost exactly 100 per cent and is clearly grave enough to amount to an unconstitutional deprivation, burden and discrimination.

B. The Tax Commission Took No Factors Other Than the Mileage Formula Into Account in Making Its Assessment and Did Not Consider Appellants' Evidence in Any Meaningful Way.

The State Tax Commission was as explicit as it is possible to be in saying that when it assessed the Norfolk & Western's rolling stock it followed precisely the steps that it followed in the case of every other interstate railroad. It said that the statute laying down the assessment formula "provides a fair and reasonable method to determine that amount of rolling stock of *any* railroad which extends beyond the limits of the

¹⁵ The Missouri court compared the depreciated value of the Wabash rolling stock with the depreciated *and equalized* value of the Norfolk & Western rolling stock. Thus, the court understated its argument. However, the court's error is of no consequence here because its argument is completely specious.

State which may be taxed by this State" (A. 57). (Emphasis added). The Commission said further that "to apply this formula to some railroads and not to others would be arbitrary and discriminatory." (*Ibid.*)

The Commission used the mileage proportion to make its initial assessment of \$19,981,757 and adhered to the initial assessment after receiving appellants' evidence, so that its final assessment was, to the dollar, \$19,981,757. Concerning appellants' evidence, the Commission said only that it did not show "that the valuation placed upon the rolling stock . . . was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of [appellants], nor . . . that in applying the formula herein indicated that the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner." (A. 57).

When one bears in mind what the Commission thus said and did, it is plain that there is no substance whatever to the suggestion of the court below that the Commission may have considered factors other than the mileage formula because "a formula alone was not the only item available to the commission's consideration." (A. 86).

Appellants' evidence tended to show that the mileage proportion was unconstitutional in its application. If there were considerations other than the mileage ratio that affected the Commission's judgment, appellants were not apprised of them, and the Commission did not think it worthwhile to recite them in its "Findings of Fact, Conclusions of Law and Decision." That document is inconsistent with any notion that the Commission thought that some other factor supported its decision. As we have said, the Commission stated in its

conclusions of law that the mileage proportion constituted "a fair and reasonable method" of determining the amount of rolling stock of "any" interstate railroad that Missouri might tax; there was, as far as the Commission was concerned, no need for additional support for use of the proportion or the result it produced in the case of the Norfolk & Western or any other road.

In their presentation to the Tax Commission the appellants carried their "distinct burden of showing by 'clear and cogent evidence' that . . . [the Missouri apportionment device] results in extraterritorial values being taxed." *Butler Bros. v. McColgan*, 315 U.S. 501, 507 (1942). It is fanciful to suggest, as the Missouri Supreme Court did, that because the Tax Commission in its decision noted that it is "the sole judge of the credibility of witnesses appearing before it" (A. 55) the Commission may have disbelieved appellants' evidence. (A. 85-86). The evidence was statistical and subject to precise verification. It was of the same order as the appellants' data that the Commission did rely upon in making its assessment. Appellants' witnesses were scarcely cross-questioned, and there was no countervailing evidence. In short, there was no basis on which the Commission could have disbelieved the evidence. Compare *Konigsberg v. State Bar Ass'n*, 353 U.S. 252 (1957). Instead, the record is quite clear that the Commission disregarded the evidence because it thought the evidence, for the most part at least, irrelevant to what the Commission conceived to be its duty of mechanically applying the mileage proportion. (A. 9-10, 11-13, 25, 36-37, 39, 42, 56-57).

This Court, then, should take the Tax Commission at its word as to what it did in this case and ignore as

after-the-fact rationalization that part of the opinion below in which the court purports to deal with the matters we have just discussed. In so doing, this Court would be showing no lack of proper deference to a state court's view of the proceedings of a state agency. Rather it would be pursuing its duty to see through to the truth of things where constitutional rights are at issue. See *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 658-59 (1945); *Great Northern Ry. v. Washington*, 300 U.S. 154, 165-68 (1937). The truth here is that a mileage proportion assessment was made and then confirmed without modification in the face of clear and cogent evidence that the result was to tax property that Missouri was not constitutionally competent to tax.

V. THE EFFECT OF THE DECISION BELOW IS TO SUBJECT THE NORFOLK & WESTERN TO THE RISK OF DOUBLE TAXATION; NO PROBLEMS OF TAX OR JUDICIAL ADMINISTRATION WOULD BE CREATED BY REVERSAL OF THAT DECISION.

One final justification for the result below has been offered by the appellees in their motion to dismiss or affirm: If the Norfolk & Western were subject to assessment according to a mileage proportion in every state in which it operated, the net effect would be that no more than 100 per cent of the value of its rolling stock would be assessed for the purpose of ad valorem taxation. On such a view, even though the states might have complaints among themselves about their shares of the total assessment, the Norfolk & Western would have no complaint. The same thought was expressed many years ago by this Court in the *Pullman Car* case when it said that, if the mileage proportion method there used "were adopted by all the States through which these cars ran, the company would be assessed upon the

whole value of its capital stock, and no more." 141 U. S. at 26.

Of course what the Court said was true, but the difficulty is that over the years the states have seen that a mileage proportion taken by itself is not the fairest or most accurate means of arriving at the value of a carrier's rolling stock within a state. As long ago as 1923 a committee of the National Tax Association reported that single-track mileage, which is the basis of the Missouri formula, "is not a satisfactory index of property distribution because it ignores terminals, nor is it a fair index of business done, because it ignores density of traffic." *Taxation of Public Utilities*, in National Tax Ass'n, *Proceedings of the Sixteenth Annual Conference on Taxation* 403, 407 (1924). Another kind of index, all-track mileage, which takes account of double tracks and sidings, was said by the committee "to overcome both of these shortcomings to a considerable degree," but still to have weaknesses and probably to be inferior to some other single element indices. *Ibid.* The committee recommended a composite multi-element formula because "no one method is a safe guide to distribution." The composite was to include all-track mileage, car mileage, physical valuation, traffic units and gross earnings. *Id.* at 410.

In the years since 1923 the mileage ratio has not achieved any greater favor with those expert in the field. In 1948 a state tax official said that "no one seriously contends that road mileage is a good factor, though strangely enough it is used in nine states. Its defects are so obvious that it deserves no further discussion." Main-track mileage, the official said, was a little better but still "very unreliable," and he criticized all-track mileage too. Chapman, *The "Operat-*

ing-Characteristics Method" of Interstate Allocation of Railroad Property, in National Tax Ass'n, *Proceedings of the Forty-First Annual Conference on Taxation* 439, 443-44 (1948). See also Faricy, *Importation of Values Through the Use of Unit Rule Formulae*, in National Tax Ass'n, *Proceedings of the Thirtieth Annual Conference on Taxation* 251, 255-56 (1938).

Of the states in which the Norfolk & Western operates only Missouri, North Carolina and Ohio have adopted the method of allocating rolling stock value solely on a road mileage proportion basis.¹⁶ Among the other states, West Virginia, for example, where much of the Norfolk & Western's coal traffic and equipment is centered, allocates values to itself for property tax purposes on the basis of a formula that takes account of traffic density by using car and locomotive miles and ton and passenger miles.¹⁷ Most other states, including those in which the Norfolk & Western operates, have adopted formulas that reflect something other than mere mileage.¹⁸

The purpose of any formula that looks solely to the valuation of locomotives and cars is to measure the fair value of the amount of railroad rolling stock that is actually within a state. This Court has regarded the

¹⁶ G.S.N. Car. § 105-366; Ohio G.C. § 5445, P.O.R.C.A. § 5727.4.

¹⁷ W. Va. Code Ann., Ch. 11, art. 6 §§ 1-2, as implemented by administrators of the taxing system in letters to the railroads concerned.

¹⁸ See, e.g., Illinois—Laws 1939, p. 886, § 84, S.H.A. ch. 120, § 565; Indiana—Acts 1949, ch. 34, § 8, p. 84, B.I.S.A. Tit. 64, § 1808; Iowa—Code of Iowa (1962) § 434.15, as amended by S.B. 772, Laws 1967; Kentucky—K.R.S. § 136.160; Michigan—CL 1948, § 207.9, M.S.A. ch. 60, § 7.259; Nebraska—N.R.R.S. 1943 §§ 77-603, -604; Virginia—Code of Va. 1950 § 58-524(5).

average number of units of rolling stock present in a state as the obvious and natural basis on which to say what is in a state for tax purposes. *Central R.R. v. Pennsylvania*, 370 U.S. 607, 613-14 (1962); *Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158, 162-63 (1933). A formula that yields a figure approximating the value of such an average number of units is fair and constitutional. But there is a risk of double taxation when one state uses a formula that attributes to it values equivalent to much more than those of the average number of units present in the state. This risk is heightened by the Court's recent decision in *Central R.R. v. Pennsylvania*, *supra*. The Court there reaffirmed the rule that a state of domicile may constitutionally tax the entire value of a carrier's fleet, other than the value attributable to units shown to be habitually present in some particular other state and thus subject to taxation by it.¹⁹ The values represented by the Missouri assessment in this case bear no reasonable relationship to the value of the units of rolling stock habitually in Missouri and thus would not, we submit, need to be taken into account by the state of domicile in making its assessment. See 370 U.S. at 611-12, 614.

In addition to producing a risk of double taxation, the fact that Missouri is atypical in its absolute reliance upon relative road mileage has another important consequence. A decision by this Court in favor of the Norfolk & Western would not have the effect of bringing into question the assessment practices of any significant number of states. But acceding to Missouri's suggestion that all would be well if other states retreated to Missouri's out-moded system would have such an effect. Most states, as we have indicated,

¹⁹ Compare *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944).

use more sophisticated indices, more apt to produce a fair measure of actual values within the state.

Moreover, a decision for the appellants need not cause administrative problems even for Missouri. On its face the Missouri statute appears to establish the mileage proportion only as a maximum limitation on the value of rolling stock that can be assessed to an interstate railroad and to permit the consideration of other factors. The court below said as much in its opinion, even though what it said was inaccurate as a description of what the Tax Commission had done in this case. (A. 85-86). That point aside, however, this Court has not hesitated to inquire into the validity of particular assessments under statutes whose general validity has been sustained and to enjoin such assessments when they represented unconstitutional applications of generally valid statutes, as in *Fargo v. Hart*, 193 U.S. 490 (1904). Cf. *Norfolk & Western Ry. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, 685 (1936), a mileage proportion case, where the Court said that "a formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions." Such cases make it plain that there is no force in the Tax Commission's assertion that it must apply the mileage proportion uniformly to all railroads to avoid being arbitrary or discriminatory. To the contrary, the rule laid down by this Court is that an agency like the Tax Commission must adjust the result of application of a mileage proportion where that result is an assessment that appropriates significant out-of-state values to the taxing state.

The burden is clearly upon a railroad to demonstrate that the application of the mileage proportion has re-

sulted in over-assessment. Only upon the production of substantial—indeed “clear and cogent”—evidence of this fact does the state have to abandon its formula and have regard to the railroad’s evidence. Compare *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 227 (1897). The number of instances in which such a showing could be made by the roads is small. And even where such a showing is made, a state will not be forced to “count cars.” Although in the nature of things much of appellants’ evidence went to the valuation of actual cars and locomotives in Missouri and although, as the court below noted, “use of the average number of units in the state has been held to be a fair method of assessment of interstate rolling stock” (A. 82), it is not a compelled method. Upon a setting aside of its mechanical application of the mileage proportion, the Tax Commission’s obligation would be to evaluate the appellants’ evidence and use the data therein in some reasonable manner to arrive at a just valuation of Missouri rolling stock.

CONCLUSION

Missouri has assessed and thereby attempted to tax property of the Norfolk & Western outside of its borders. In so doing it has discriminated against interstate railroads with low concentrations of rolling stock in Missouri. Its action is plainly unconstitutional under the commerce clause and the due process clause.

The judgment below sustaining this action should therefore be reversed.

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NOVEMBER 1967

STATUTES

STATUTES**Vernon's Annotated Missouri Statutes (1952)****§ 138.420. Power of original assessment—notification—modification of decision**

1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms.
2. After original assessments of the state tax commission have been completed each corporation, person or public utility interested therein shall be promptly notified of the action of the commission and shall have the right to apply for a rehearing. The commission shall grant and hold such rehearing and fix the date thereof.
3. If, after such rehearing and a consideration of the facts, the commission shall be of the opinion that the original decision or any part thereof should be changed, the commission may change or modify the same and such assessed valuations as are finally determined shall be certified to the clerks of the several county courts and to the assessor in St. Louis city at the same time that valuations of real and tangible personal property are returned.
4. Said commission shall also have all power of original assessment of real and tangible property in the possession of any assessing officer on January first. (L. 1945 p. 1805 § 15, A.L. 1947 V. I, p. 548)

§ 147.010 Annual franchise tax—exceptions

1. For the taxable year of 1943 and thereafter every corporation of this state organized under or subject to chapter 351, RSMo 1949 or under any other laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus, or if the outstanding shares of such corporation or any part thereof

consist of shares without par value, then, in that event, for the purpose herein contained such shares shall be considered as having a value of five dollars per share unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus. If such corporation employs a part of its outstanding shares in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding shares and surplus employed in this state, and for the purposes of this chapter such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located.

2. Every foreign corporation engaged in business in this state whether under a certificate of authority issued under chapter 351, RSMo 1949 or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of five dollars per share, unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this chapter such corporation shall be deemed to have employed in this state that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located.

3. Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their premium receipts in this state; provided, bank deposits shall be considered as funds of the individual depositor, left for

safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this chapter. (L. 1943 p. 410 § 135)

§ 151.010. What railroads are taxable

All railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all real property, tangible personal property, and intangible personal property, owned, hired or leased by any railroad company or corporation in this state, shall be subject to taxation, and taxes levied on real property, and tangible personal property, shall be levied in the manner herein set forth, and the taxes on intangible personal property shall be levied and collected in the manner otherwise provided by law. (L. 1945 p. 1825 §2)

§ 151.020. Railroad companies to make annual statement to state tax commission—penalty

1. On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof.

2. In case the report, from any railroad, required by this section, is not received by May first of the year in which it is due the state tax commission may, at its discretion, increase by four per cent the total assessed valuation of the railroad company and certify such increase to the director of revenue for collection. (L. 1945 p. 1825 § 3)

§ 151.060. Commission to assess, adjust and equalize valuation—hearings

1. The state tax commission shall assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 151.020.

2. The commission shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other tangible property belonging to said railroad companies, or tangible property belonging to any railroad companies in this state of the kind specified in section 151.020, upon which no returns have been made, which may be otherwise known to them, as they deem just and right.

3. In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall ex-

tend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company. (L. 1945 p. 1825 § 7)



DEC 27 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 324.

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY,
Appellants,

vs.

MISSOURI STATE TAX COMMISSION; Hunter Phillips;
Howard J. Love; J. Ralph Hutchison, Members of the
Missouri State Tax Commission, and J. R. Towson, Secretary
of the Missouri State Tax Commission,
Appellees.

On Appeal from the Supreme Court of Missouri.

BRIEF FOR APPELLEES.

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of the Missouri State Tax Commission,
Appellees.

On Appeal from the Supreme Court of Missouri.

BRIEF FOR APPELLEES.

OPINIONS BELOW.

The opinion of the Missouri State Tax Commission (A. 52) is not officially reported.* The Circuit Court of Cole County, Missouri, did not render an opinion. The opinion of the Supreme Court of Missouri (A. 69) is not yet reported.

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on December 30, 1966 (A. 68). A timely motion for rehearing was denied on February 13, 1967 (A. 2). A notice

* Citations to the portions of the record that are reprinted in the appendix are cited (A. 1, et seq.); citations to other parts of the record are cited (R. 1, et seq.). References to Appellants' Brief are designated (B. 1, et seq.).

of appeal to this Court was filed in the Supreme Court of Missouri on May 9, 1967 (A. 2). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(2). This Court noted probable jurisdiction on October 9, 1967. The appellees raised a question of jurisdiction in their motion to dismiss or affirm. In light of the Court's action on that motion, it is assumed that the Court does not want any further argument on the jurisdiction question and, therefore, appellees will make none. However, this Court has said in U.S. v. Green, 350 U.S. 415, (1955), that a question of jurisdiction should be reasserted. Therefore, appellees again point out that the appellants have specifically stated they are not attacking the constitutionality of the Missouri laws (A. 78). If this be true, and from their brief it appears that it is, then a constitutional question pursuant to 28 U.S.C., Section 1257(2), has not been raised by appellants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article I, Section 8, clause 3, of the United States Constitution provides:

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

The XIV Amendment, Section 1, of the United States Constitution provides in pertinent part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Section 151.060(3), of Revised Statutes of Missouri (1959)*, provides in its part most pertinent to this case:

* All statutory reference herein refer to the Revised Statutes of Missouri, 1959, and Vernon's Annotated Missouri Statutes (V.A.M.S.).

"In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

QUESTIONS PRESENTED.

This case involves the validity of an assessment made by the Missouri State Tax Commission in accordance with Section 151.060 which prescribes a formula for assessing the rolling stock of interstate railroads for the purposes of ad valorem taxation. This formula, sometimes called the mileage or trackage formula, apportions to Missouri that portion of the entire value of all of the rolling stock of such railroads on the ratio of miles of road operated in Missouri to the railroads' total road mileage. On October 16, 1964, appellant Norfolk & Western became lessee of all of the properties of appellant Wabash which had tracks and operations in Missouri which Norfolk theretofore had not. For the following year, as of January 1, 1965, an assessment was made against Norfolk & Western by applying to the value of the entire Norfolk & Western fleet, owned and leased, the ratio of the leased mileage in Missouri to the total Norfolk & Western mileage.

The questions presented are these:

1. Whether the mileage or trackage formula provided for in Section 150.060(3) resulted in a grossly excessive valuation by the Missouri State Tax Commission of appellant Norfolk & Western's rolling stock in Missouri on January 1, 1965, in violation of the due process clause of the XIV Amendment of the Constitution of the United States or the commerce clause, Article I, Section 8, thereof.
2. Whether the appellants have shown by clear and cogent evidence that the assessment made by the Missouri State Tax Commission on January 1, 1965, against appellant Norfolk & Western is grossly excessive and in violation of the due process clause of the XIV Amendment of the Constitution of the United States or the commerce clause, Article I, Section 8, thereof.

STATEMENT.

The State Tax Commission of Missouri has the exclusive power of original assessment of railroads, railroad cars and rolling stock, Section 138.420(1). Section 151.010 subjects to taxation by the State of Missouri " * * * all real property, tangible personal property, * * * owned, hired or leased by any railroad company or corporation in this state, * * * ". "In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such rail-

road company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company." Section 151.060(3).

Appellants Wabash Railroad Company and Norfolk & Western Railway Company entered into a lease effective October 16, 1964, whereby Norfolk & Western leased all of the properties of Wabash under a long term lease. As part of the payment due under the lease, Norfolk & Western is to pay all taxes on the leased property. Prior to the lease, Norfolk & Western had no tracks in Missouri and did not operate in this state (A. 5).

Thereafter, pursuant to statute and using the statements required to be furnished by all affected railroads, the Commission notified Norfolk & Western that its assessment for 1965 taxes on its properties was \$31,298,939.00. This amount includes an assessed value for roadbeds in the amount of \$11,677,875.00; for buildings in the amount of \$499,722.00; and, for rolling stock in the amount of \$19,981,757.00, less \$860,415.00 which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts (A. 5-6).

This assessment was made against Norfolk & Western as lessee of the property being assessed. No assessment was made against Wabash (A. 5; 53).

The assessment of the rolling stock leased by Norfolk & Western was made in accordance with Section 151.060(3), in that the Commission determined the assessed value of the entire rolling stock of Norfolk & Western wherever situated to be in the amount of \$513,309,877.00. This was arrived at as in all other railroad assessments made by the Commission by taking the original cost of the equipment by the year of acquisition and allowing five per cent depreciation per year but with a maximum depreciation of seventy-five

per cent of the original cost. Thereafter, as in the case of all railroad assessments for the year 1965, a factor of forty-seven per cent was applied by the Commission, resulting in the figure of \$241,255,643.00.

The Commission then determined that 8.2824 per cent of all the main and branch line tracks owned or leased everywhere by Norfolk & Western were leased, owned or controlled by Norfolk & Western in Missouri. This percentage of the depreciated and equalized value of the entire amount of Norfolk & Western's rolling stock was determined to be \$19,981,757.00 (A. 5-6; 52-57).

No question has been raised concerning the valuation placed upon the leased roadbeds or buildings. Nor do appellants question the total valuation placed upon the rolling stock of Norfolk & Western, wherever located, the method of depreciation and equalization, nor the trackage percentage used to apportion the rolling stock.

The only question raised is whether under special circumstances allegedly present in this case, the valuation determined by the statutory formula fairly reflected that portion of Norfolk & Western's rolling stock subject to taxation in this state.

At the hearing before the Commission appellants presented evidence tending to show that a large portion of the new rolling stock, consisting of expensive equipment used for its coal hauling operations in the eastern portion of the country, did not enter the State of Missouri and acquired no situs in this state. Using the mileage apportionment formula under these circumstances, it was contended, constitutes taxation of property not within the state's jurisdiction and in violation of the due process amendment and commerce clause in the Federal Constitution.

The Commission found against appellants, holding among

other things, that "the evidence adduced by appellants does not show that the valuation placed upon the rolling stock of petitioner was grossly excessive nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of petitioner, nor does the evidence adduced by the petitioner show that in applying the formula herein indicated that the Commissioner acted in an unlawful, improper, arbitrary or capricious manner." (A. 57).

The Commission's Findings were affirmed upon appeal by the Circuit Court of Cole County and again by the Supreme Court of Missouri (A. 67, 68).

ARGUMENT.**I.**

The mileage or track formula of Section 151.060(3), as applied to appellant Norfolk & Western, allocated a reasonable value of appellant's rolling stock to Missouri on January 1, 1965.

A.

The Mileage Formula is a valid method for allocating value.

The assessment of appellant Norfolk & Western's rolling stock in this state on January 1, 1965, was made according to the authority of Section 151.060(3). Appellants do not question the valuation placed upon fixed property by appellees. Nor do they question the total valuation placed upon Norfolk & Western, the method of depreciation or the 47 per cent factor which the appellees used to adjust and equalize the assessed valuation placed upon the property. Appellants have not alleged that the formula was mis-applied, but rather admit that it was properly applied (B. 35). The direct question then concerns the validity of the formula and allocation of value thereunder.

It can hardly be questioned that the State of Missouri does have the power to impose an apportioned tax upon the value of rolling stock of an interstate railroad found habitually in the state. **Central R. R. v. Pennsylvania**, 370 U.S. 607 (1962); **Pullman's Palace Car Co. v. Pennsylvania**, 141 U.S. 18 (1891); **Marye v. Baltimore & O.R.R.**, 127 U.S. 117 (1888). This Court explained the reason for such authority in **Johnson Oil Refining Co. v. Oklahoma**, 290 U.S. 158, 162.

"The basis of the jurisdiction is the habitual employment of the property in the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the

State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the naure of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits. (Citations)"

The Supreme Court of Missouri has recognized and followed the dictates of **Johnson Oil Refining Co. v. Oklahoma**, supra, in **St. Louis Southwestern Ry. Co. v. State Tax Commission**, (Mo. 1959), 319 S.W.2d 559, 561, wherein it stated:

"* * * However, Missouri does not use the 'average number of units' formula, but instead uses a formula based on the ratio of number of miles of road in this state to the number of miles of road in all states. This method of assessment has also been judicially approved when the result is fair. * * *"

Citing **Pullman's Palace Car Co. v. Pennsylvania**, 141 U.S. 18. The Supreme Court of Missouri has also recognized that the mileage formula can give unfair results and in **St. Louis Southwestern Ry. Co. v. State Tax Commission**, supra, p. 561, stated:

"* * * But it is clear that under particular factual situations this formula can result in unfair and unrealistic taxation, and this method was held invalid in at least one situation where the application of the formula resulted in a valuation for tax purposes far in excess of the value of the average number of units present in the state. * * *"

Citing **Union Tank Line Co. v. Wright**, 249 U.S. 275, as one of the authorities.

The faults of the mileage formula which can result in an unfair assessment, against which this Court has consistently warned, are well recognized by the Supreme Court of Missouri and appellees.

When the mileage formula has been improperly and routinely applied what factual circumstances have been present? Generally, the tax has been measured by a method other than the total depreciated, equalized value of the taxpayers' rolling stock. The Missouri law requires, in the situation of an interstate railroad, that the method of valuation be the total depreciated, equalized value allocated by the mileage formula. Section 151.060. However, cases in which this Court has struck down invalid assessments generally fall into two methods of total valuation as illustrated by **Fargo v. Hart**, 193 U.S. 490 (1904), and **Wallace v. Hines**, 253 U.S. 66 (1920).

In **Fargo v. Hart**, *supra*, the State of Indiana had authorized tax on the property of express companies. The Indiana Tax Commission attempted to set the total valuation by all assets wherever located. The express companies objected upon the grounds that some of the assets so included were not related to the express companies' business in Indiana and the Court agreed. The Court, speaking through Mr. Justice Holmes, confirmed the mileage formula and organic value and then stated, *l.c.* 501:

"* * * We have explained why, in our opinion, this cannot fairly be treated as a mere case of overvaluation, but is an assessment made upon unconstitutional principles. * * *"

The principle is thus established if the total valuation is excessive, allocation or proportion by the mileage formula

is inherently defective, not because of the formula but rather because of the excessive total valuation. An assessment based upon a fact situation similar to **Fargo v. Hart** is unconstitutional; however, in the instant case appellants have not challenged the total valuation, only the results of the mileage formula.

The second method of valuation that has produced defective assessments is illustrated by **Wallace v. Hines**, *supra*. In the **Wallace** case North Dakota had authorized an excise tax on railroads, the total to be measured by the taxpayers' entire stock and bond issue. The taxpayer was in possession of bonds secured by a mortgage on land outside of North Dakota and objected to the assessing of these bonds. The North Dakota law also provided for a mileage formula for interstate railroads. Again, Mr. Justice Holmes, speaking for the Court (253 U.S. 66, 69-70), confirmed the mileage formula, organic value, and stated:

"*** Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. ***"

The error in the **Wallace** case was again in the total valuation, which in the instant case appellants have not questioned.

To distinguish the excessive total valuation cases, as represented by **Fargo v. Hart**, *supra*, a different and more applicable problem is illustrated by **Union Tank Line Co. v. Wright**, 249 U.S. 275 (1919). In the **Union Tank Line** case the State of Georgia authorized a property tax and a franchise tax on railroads. The property tax was to be assessed on total valuation of the rolling stock operated in the state. Valuation on interstate railroads was to be allocated by the

mileage formula. The Georgia Comptroller General assessed the taxpayer, who thereupon objected on the basis that the assessment was in excess of the actual number of cars in the state by 350. This Court, speaking through Mr. Justice McReynolds (249 U.S. 275, 282, 283), again confirmed organic value, the general theory of the mileage formula, but in so doing criticized its application in the case because of the great disparity between the value of the actual number of cars, \$47,310.00, and the assessed value, \$291,196.00 (249 U.S. 275, 283). This Court also noted that the rule in **Fargo v. Hart**, 193 U.S. 490, did not apply, which appears to us to distinguish between excessive valuation assessments and indiscriminate application of the mileage formula, or unit rule as it is referred to in the **Union Tank Line** case.

B.

The mileage formula did not allocate an unreasonable or grossly excessive value to appellees.

What precisely do appellants urge to demonstrate that the assessment is "gross excessiveness"? **Union Tank Line Co. v. Wright**, 249 U.S. 275, 282. They assert that compared with the last assessment, prior to the lease, Wabash was assessed at approximately one half of this assessment, but then criticize the Missouri Supreme Court for making a similar comparison (B. 42). The facts are uncontested as to the present and immediately past assessments. Prior to the lease, Wabash was assessed \$10,103,340.00 on a total depreciated, equalized rolling stock value of \$82,456,813.00. In the next succeeding assessment appellant Norfolk & Western was assessed \$19,981,757.00 on a total depreciated, equalized rolling stock value of \$241,255,643.00.

While appellants state that the challenged assessment is disproportionate by nearly 3 to 1 (B. 41) they failed to point out that this Court does not regard approximately 3 to 1 as being grossly excessive. In **Nashville, C. & St. L. Ry. v.**

Browning, 310 U.S. 362, 366, this Court sustained such an assessment for property taxes against the railroad. In so holding, this Court distinguished **Union Tank Line Co. v. Wright**, 249 U.S. 275; **Wallace v. Hines**, 253 U.S. 66 (1920); and **Southern Ry. v. Kentucky**, 274 U.S. 76 (1927), on the grounds that (310 U.S. 362, 366):

"* * * Wherever the state's taxing authorities have been held to have intruded upon the protected domain of interstate commerce in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis. * * *,

Appellants have not shown the gross excessiveness of (600%) of **Union Tank Line**; excessive total valuation of **Wallace v. Hines**; or, gross excessiveness of **Southern Ry. v. Kentucky**. Even if appellants are heard to urge the 3 to 1 disparity, that is not grossly excessive in the light of enhanced value.

C.

The organic relationship of appellants' rolling stock habitually found in Missouri contributes to the value of the **Norfolk & Western System**.

"While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well the intangible value due to what we have called the organic relation of the property in the state to the whole system." **Union Tank Line Co. v. Wright**, 249 U.S. 275, 282 (1919).

Appellants attack the opinion by the Supreme Court of Missouri in its holding below concerning enhanced value (B. 30, 31). Appellants urge that the Missouri law is not the kind of statute that can reach enhanced value (B. 3). This is because the Missouri statutes are "horse and wagon"

statutes, appellants said, relying on Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897), (B. 34). The point being made by this Court in the Adams Express Co. case, speaking through Mr. Justice Brewer, is that a general tax on horses and wagons is to be distinguished from a property tax specifically on express companies. That Section 151.010, et seq., is a tax specific on railroads can hardly be debated.

Appellants contend that while the mileage formula as applied in many cases (B. 32, 33) does reach enhanced value, the Missouri law cannot because it is different. How different is the Missouri law? In comparing the authority of Section 151.010, et seq., with three of the cases appellants say do reach enhanced value, it is obvious that there is no difference between them and the Missouri law. Appellants say (B. 33) Pullman Co. v. Richardson, 261 U.S. 330 (1923); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897); and, Cleveland, C.C. & St. L. Ry. v. Backus, 154 U.S. 439 (1894), all have mileage formulas that do reach and assess enhanced value. All of these cases involve a property tax upon the total valuation of the taxpayer and allocation by a mileage formula. No valid distinction can be made because one method or another is used to reach a total valuation of the property upon which the tax is assessed. Pullman Co. v. Richardson, 261 U.S. 330, 339 (1923). There is nothing to distinguish the Missouri law from the cases cited by appellants. The Missouri law is intended to take enhanced value into consideration, and the Supreme Court of Missouri has so held/below (A. 83).

Appellants have also urged that enhanced value should be computed separately and added into the total valuation (B. 34) and that even if the Missouri law does contemplate enhanced value, it is inconsistent with the facts shown (B. 38, 39). Nowhere in any case has any property tax authority applied a separate computation to determine en-

hanced value on rolling stock. The very nature of enhanced value defies such a determination. **Cleveland, C.C. & St. L. Ry. v. Backus**, 154 U.S. 439, 445 (1894). In asserting that enhanced value cannot support the assessment, appellants have contended that they can show that only three per cent of their rolling stock valuation was habitually in Missouri but they were taxed on eight per cent (B. 31). By their own admission then the alleged disparity is five per cent, a figure that is reasonable even in the absence of enhanced value which certainly should increase when the system's total depreciated, equalized valuation is increased from \$80,000,000.00 to \$200,000,000.00 after the effective date of the lease. Can this court, or any court as a matter of law, find that alleged five per cent disparity is grossly excessive? Appellees do not think so, and appellants have shown no authority supporting such a finding.

Appellants have also asserted generally throughout that Norfolk & Western's operations are unique in its coal hauling aspects (A. 15-16). That rolling stock so used will never enter Missouri and that therefore it should not be taxed, appellants agree. Units not habitually found in Missouri are not taxed, and indeed cannot be taxed. **Union Tank Line Co. v. Wright**, 249 U.S. 275 (1919). Appellants are apparently urging that these coal hauling units are not a part of the system for the purpose of valuation in the sense that the bonds were excludable in **Wallace v. Hines**, 253 U.S. 66 (1920), and the assets in **Fargo v. Hart**, 193 U.S. 490 (1904). This is a very curious position taken by appellants. On one hand they assert the vital importance the coal hauling has to the Norfolk & Western system (A. 15-16) and on the other hand maintain it has no relation to the value of the system (B. 40), but yet do not challenge the total depreciated, equalized valuation of rolling stock. Such a position would be analogous to the factual situation in **Wallace v. Hines**, *supra*, and **Fargo v. Hart**, *supra*, where the taxpayer did not chal-

lenger the total valuation as being excessive but only attacked the application of the mileage formula. Such a position taken by appellants can only be sustained if they can show that the coal hauling units are not a part of the system and have no relation to the enterprise, and they have not done this. The disproportion in **Wallace v. Hines** and **Fargo v. Hart** resulted from an inclusion of assets in measuring the total valuation that had no direct relation to the system or enterprise in the taxing authorities' state. Any mileage formula will inherently produce an excessive assessment if the total valuation is excessive, and the result is not an over-valuation, but an unconstitutional principle. **Fargo v. Hart**, 193 U.S. 490 (1904).

II.

Appellants have failed to show by clear and cogent evidence that the assessment is so grossly excessive that it results in taxing property not having a situs in Missouri.

Appellees have demonstrated in Point I. B. in an affirmative manner that the assessment is not grossly excessive. However, the burden is upon the appellants to show such excessiveness, **Norfolk & Western Ry. v. North Carolina ex rel. Maxwell**, 297 U.S. 682, 685 (1936), by clear and cogent evidence. **Butler Gros. v. McColgan**, 315 U.S. 501 (1942). Appellants have wholly failed to bear the burden of showing that this assessment is grossly excessive.

In allocation of value to the taxing state, absolute accuracy is not necessary and, in fact, usually impossible. Therefore, at best, allocation by mileage formula is an estimate, but nevertheless, valid in the absence of gross disparity. **Union Tank Line Co. v. Wright**, 249 U.S. 275 (1919), and **Pullman Co. v. Richardson**, 261 U.S. 330 (1923). Appellees, by virtue of Section 151.060(3), are mandatorily required to administer that law, including the mileage formula, uniformly and routinely, unless the result is plainly excessive.

Even assuming for the purpose of argument that the difference in value between what appellants say (three per cent) and what the mileage formula produces (eight per cent) is true, can a five per cent disparity be grossly excessive? Appellees urge that the assessment is reasonable and substantial enhanced value accrued when the Wabash rolling stock became part of the Norfolk & Western system. But even if the alleged five per cent disparity is true, it is not by any authority what is contemplated by the term "grossly excessive." The clearly inflated assessment present in **Union Tank Line Co.** is not found in the instant case. It is of no import for appellees to argue the principles of **Fargo v. Hart** and **Wallace v. Hines** because contrary to appellants urging (B. 39), the problem here is whether or not allocation of value by the mileage formula bears a reasonable relationship to the valuation of the number of units or rolling stock in Missouri. This is not a question of excessive total valuation.

This Court has not issued percentage boundaries the exceeding of which will be excessive. But this Court has said that the difference between \$80,000,000.00 and \$22,000,000.00 is not excessive, **Pittsburgh, C.C. & St. L. Ry. v. Backus**, 154 U.S. 421 (1894); that \$16,000,000.00 as opposed to \$23,000,000.00 is not excessive, **Nashville, C. & St. L. Ry. v. Browning**, 310 U.S. 362 (1940); and, .6 per cent as opposed to 1.7 per cent is not excessive in **Railway Express Agency v. Virginia**, 358 U.S. 434 (1959).

If the tax assessment herein challenged is fairly apportioned to the commerce carried on within the State of Missouri, both the commerce clause and due process are satisfied. **Ott v. Mississippi Valley Barge Line Co.**, 336 U.S. 169 (1949).

Appellants have not shown by clear and cogent evidence that the allocation by mileage formula has resulted in an

unfair apportionment and therefore must fail on this issue.

III.

The issue of double taxation raised by appellants is wholly without merit.

Appellants have raised the question that they may be subject to the risk of double taxation because of the application of the mileage formula. Their contention is based on the argument that the same property may be taxed by Missouri and other states. This claim does not amount to double taxation. Double taxation in the objectionable or prohibited sense is taxing by the same taxing authority, the same property twice, in the same period, for the same purpose. 84 C.J.S., Taxation, Section 39, pp. 131, 132.

The taxation of property which is within the jurisdiction of the state, at least during a portion of the taxing period, is not rendered objectionable as double taxation by the fact that the same property is, or may be, also assessed for taxation in another state. **Northwest Airlines v. State of Minnesota**, 322 U.S. 292 (1944).

Furthermore, even if there was double taxation, the Federal Constitution does not prohibit or prevent the states from imposing double taxation. **Swiss Oil Corporation v. Shanks**, 273 U.S. 407, 413 (1927), and **Kirtland v. Hotchkiss**, 100 U.S. 491, 498 (1879). In **Illinois Cent. R. Co. v. State of Minnesota**, 309 U.S. 157, 164 (1940), the court said:

"Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the 'Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds.' " Citing **Ft. Smith Lumber Co. v. Arkansas ex rel. Arbuckle**, 251 U.S. 532, 533 (1920).

CONCLUSION.

The Missouri State Tax Commission has fairly apportioned the total depreciated, equalized valuation of Norfolk & Western's rolling stock and the allocation of value to the State of Missouri meets the standards of the commerce clause and due process.

The judgment below should be sustained.

Respectfully submitted,

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No. 324

U.S. SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS;
HOWARD L. LOVE; J. RALPH HUTCHINSON, Members
of the Missouri State Tax Commission, and
J. R. TOWSON, Secretary of the Missouri
State Tax Commission, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR APPELLANTS

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JANUARY 1968



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ON APPEAL FROM THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR APPELLANTS

The question in this case is whether Missouri has exceeded constitutional limitations on its taxing power by placing on its tax rolls values representing property of the appellant Norfolk & Western that is used by the railroad in conducting its interstate operations outside Missouri. A question indistinguishable in principle has been decided by this Court in at least four cases in which it has invalidated the use by state taxing authorities of mileage ratio methods of assessing property for tax purposes comparable to the

method used by Missouri here. Appellees' answer to these authorities is to say that two of them, *Fargo v. Hart*, 193 U.S. 490 (1904), and *Wallace v. Hines*, 253 U.S. 66 (1920), involved an issue of valuation different from the issue of allocation of values posed here; and that under the others, *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), and *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927), it is permissible for Missouri to ascribe to itself two or three times the value associated with property in the state since an over-allocation of that magnitude is not so grossly excessive as to be unconstitutional.

In the first two sections of this reply brief we shall take up the appellees' misconceived treatment of the opinions of this Court on which appellants rely. Then we shall deal briefly with their equally mistaken discussion of enhanced value and their odd assertion that the potential for double taxation in what they have attempted to do here raises no constitutional doubt.¹

¹ Appellees also suggest that since appellants are "not attacking the constitutionality of the Missouri laws . . . a constitutional question pursuant to 28 U.S.C., Section 1257(2), has not been raised by appellants." (Appellees' Brief p. 2). Appellants, it is true, have not attacked the Missouri statute as being constitutionally invalid *in toto* and for every purpose, but rather have attacked the statute only as applied to them. (A. 7, 65). But it is absolutely clear that such an attack on a statute, when rejected by a state court, does provide the proper basis for an appeal to this Court. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921). Indeed, *Great Northern Ry. v. Minnesota*, 278 U.S. 503, 507 (1929), where this Court held that an appeal was the proper method to review a state decision which sustained a statutory mileage proportion in its particular application, is on all fours with the present case. See also *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919). Thus, appellees' questioning of this Court's jurisdiction on appeal is completely without merit.

I. Fargo v. Hart and Wallace v. Hines are not "excessive total valuation" cases.

The appellees' argument that *Fargo v. Hart*, 193 U.S. 490 (1904), and *Wallace v. Hines*, 253 U.S. 66 (1920), involved challenges to the total valuation of the taxpayers, whereas the instant case presents a challenge to Missouri's method of allocation of an agreed total value (Appellees' Brief pp. 10-12),² rests on a gross misreading of the two cases. In *Fargo v. Hart* the Court stated that "the real question of the case" was whether Indiana had taken into account property that it had no right to impose a tax upon. *Id.* at 498. The vice of Indiana's method of assessment lay in the use of the mileage proportion to bring property into Indiana that had no place there; the vice was not in the valuation of that property. The Court made this very clear in its explanation of the limitations on the circumstances in which a mileage proportion could validly be used:

"So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense." 193 U.S. at 500.

Similarly, *Wallace v. Hines* did not turn on excessive total valuation. There the protesting railroads claimed, and this Court held, that North Dakota's mileage proportion operated unconstitutionally because

² Appellees' brief will be cited hereafter as "(Br. —)."

(1) the railroads' property was not evenly distributed over their systems and (2) some of their property brought into North Dakota's tax account by the mileage proportion did not contribute anything to the value of the property in North Dakota. The railroads did not contend that this out-of-state property could not be considered in placing an overall valuation upon them, as, for example, by the United States in levying a tax on their entire business.

Appellants' position here is, therefore, like that of the taxpayers in those two cases. It is that Missouri's mileage proportion operated inequitably because there was less rolling stock in Missouri than relative track mileage would indicate and because most of the rolling stock outside Missouri, notably the Norfolk & Western's coal-carrying equipment, contributed nothing to Missouri values. In both of these aspects appellants' challenge is to Missouri's allocation of values. They do not question that the value of the Norfolk & Western's fleet of rolling stock, including its coal cars and special coal train locomotives, was correctly ascertained. There was no occasion for them to raise such a question despite appellees' murky intimations to the contrary. (Br. 15-16).

An attempt by the appellees to distinguish *Fargo v. Hart* and *Wallace v. Hines* from *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), which the appellees concede is closely similar to the present case, illuminates the insubstantial nature of their claim that the first two cases dealt merely with "excessive total valuation." Appellees say that "this Court also noted [in *Union Tank Line*] that the rule in *Fargo v. Hart*, 193 U.S. 490, did not apply," which they say appears "to distinguish between excessive valuation assessments and indiscriminate application of the mileage

formula" (Br. 12). There is a statement in the opinion in *Union Tank Line* "that there are no such circumstances as to bring . . . [the case] within the ruling made in *Fargo v. Hart*, 193 U.S. 490," 249 U.S. at 282, but the quoted language is itself a quotation from the Supreme Court of Georgia, whose decision was being reversed by this Court. Moreover, in *Union Tank Line*, *Fargo v. Hart* was cited twice in support of the holding. 249 U.S. at 282-83, 286. Subsequently, Mr. Justice Holmes in his opinion for a unanimous Court in *Wallace v. Hines* cited both *Fargo v. Hart* and *Union Tank Line*. 253 U.S. at 70. Thus, it is clear that *Fargo v. Hart*, *Wallace v. Hines* and *Union Tank Line* all are grounded in the same principle: a state may not place on its tax rolls property that is outside the state and contributes nothing to the value of the property inside the state.

There is on the books such a case as the appellees profess to find in *Fargo* and *Wallace*. The case is *Great Northern Ry. v. Weeks*, 297 U.S. 135 (1936). It condemned a property assessment merely because the valuation base from which the state's share was determined was thought excessive. It was described as the only case of its kind in a dissent, 297 U.S. at 154,⁸ and again in a case that limited its authority to its own facts, *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 371 (1940). In any event, in the *Great Northern*

⁸ In the dissent Mr. Justice Stone, joined by Mr. Justice Brandeis and Mr. Justice Cardozo, said that "cases setting aside an excessive allocation of railroad system value to the taxing state," among other categories of cases, "do not support the decision now made." *Great Northern Ry. v. Weeks*, 297 U.S. 135, 156-57 (1936). The cases cited by the dissenters as involving an excessive allocation, not valuation, were *Fargo v. Hart*, 193 U.S. 490 (1904); and *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102 (1934). (See Appellants' Brief p. 28).

case the Court, before making its holding on excessive valuation, rejected an argument of unconstitutional allocation. 297 U.S. at 143-45. Similarly, in *Browning* the authority of *Wallace v. Hines* and other cases in the line of decisions invoked by appellants here was recognized, 310 U.S. at 365-66, and the railroad's argument based upon *Great Northern* was treated as a separate and different argument.

In the light of the above, there is no substance whatever to appellees' contention that *Fargo* and *Wallace* are in any legally relevant way different from this case.

**II. The nearly 3 to 1 disparity shown by appellants
is "grossly excessive."**

Having acknowledged that the *Union Tank Line* case is comparable to this one, appellees take up their next line of defense, which is that the overassessment here, even if it arises from an error of law in the application of the Missouri mileage formula, is not so "grossly excessive" as to require invalidation by this Court. They also urge that the assessment is not so "grossly excessive" as was that in *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927), another case in which this Court held—and appellees do not deny the holding—that an allocation made pursuant to a mileage proportion was invalid. (Br. 12-13, 16-18).

Union Tank Line, the admitted case of grossly excessive allocation, is described as a case in which the excessiveness was 600 per cent (Br. 13), whereas the appellees, in an obvious and flagrant twisting of words, state that the excessiveness here was only 5 per cent—the difference of 5 percentage points between the 8 per cent of rolling stock value that Missouri ascribed to itself and the 3 per cent of such value represented by rolling stock in Missouri (Br. 15). The state tax au-

thorities in *Union Tank Line* apparently lacked appellees' ingenuity and did not think to argue that all that was involved there was the difference between .45 per cent and 2.8 per cent and that no one could believe that a difference of a mere 2.35 per cent reflected gross excessiveness.⁴ Of course, 8 per cent is 267 per cent of 3 per cent. That is the minimum measure of the excessiveness of the assessment here.

Appellees' attempt to show that Missouri's allocation to itself of nearly three times the value of the Norfolk & Western's property in Missouri falls within the boundaries set by this Court's prior decisions is similarly unconvincing. Appellees first state that in *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 366 (1940), this Court sustained a 3-1 overassessment. (Br. 12-13). Later in their brief, however, the appellees state somewhat more accurately that in *Browning* this Court held "that \$16,000,000.00 as opposed to \$23,000,000.00 is not excessive." (Br. 17). In fact, the comparison between these two figures in *Browning* is of no aid in deciding the present case. As revealed by the opinion of the Tennessee Supreme Court in *Browning*, 140 S.W.2d 781, 784 (1939), the protesting railroad derived the \$16 million figure by capitalizing net operating revenue at 6 per cent, while the \$23 million figure was that which was fixed by the state in its assessment. The holding of the Tennessee Court, which was affirmed by this Court, was that the assessment board was not "under any legal compulsion to make the assessment on the basis of capitalization of net income, or to make net income a predominant factor in arriving at the value of the property." In

⁴The questioned assessment was \$291,000. That was 2.8% of the system property value of \$10.5 million. The company claimed property in Georgia worth \$47,000, .45% of system value. *Union Tank Line Co. v. Wright*, 249 U.S. 275, 277 (1919).

the present case, on the other hand, it is undisputed that the proper aim of the Missouri tax law is to determine the value of rolling stock within the state. See *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559 (Mo. 1959). See also *Braniff Airways v. Nebraska State Bd.*, 347 U.S. 590, 603 (1954) (concurring opinion). And the figures advanced by appellants before the Commission unquestionably reflect the value of rolling stock within the state on an average. See *Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158, 162 (1933). Moreover, the overassessment in *Browning*, even on the railroad's own theory, was something less than 50 per cent, not nearly 300 per cent as in the present case.

The other two cases cited by appellees are similarly inapposite. In *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959), this Court did uphold a tax on 1.7 per cent of an express company's gross receipts, despite a showing that only .6 per cent of its tangible property was located within the taxing state. However, the tax there was on the company's franchise, which comprehended intangible as well as tangible property. This Court noted that there was no showing by the express company that there was a direct relationship between tangible assets in the state and gross receipts, the proper measure of the franchise tax. *Id.* at 443-44. Moreover, there were good grounds for Virginia's claim of 1.7 per cent of the taxpayer's gross receipts, since 1.9 per cent of the taxpayer's total contract mileage was located within the taxing state. *Id.* at 444.

Pittsburgh, C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894), sheds no light on the instant case. There this Court refused to hold that a mere increase in tax between one year and another, even though nearly

three-fold, in itself made the larger tax unlawful.⁵ As Mr. Justice Brewer stated for the majority:

"Still, it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be adjudged illegal." 154 U.S. at 432.

The Court went on to consider that testimony and to hold that it supported the taxing state's contention that no tax was levied on property located outside the state. *Backus*, therefore, would be on point only if appellants were arguing that, standing alone, the two-fold increase in the tax between 1964, when the Wabash owned the road, and 1965, when it passed to the hands of the Norfolk & Western, proved the illegality of the Missouri taxing scheme. The appellants' argument, of course, is not based on that single comparison, although that comparison is probative of the excessiveness of the appellees' assessment when it is considered with appellants' evidence that the acquisition of the Wabash road by the Norfolk & Western produced no significant change in operations.

III. The doctrine of "enhanced value" cannot justify Missouri's overassessment.

The appellees' excuse for the overassessment of the Norfolk & Western rolling stock on grounds of the "enhanced value" of that rolling stock due to incorpora-

⁵ The increase was from \$8.5 million to \$22.7 million and not, as indicated in appellees' brief (Br. 17), from \$22 million to \$80 million. *Pittsburgh, C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 432 (1894).

tion in the Norfolk & Western system merits comment, for appellees seem totally to misconceive the so-called "enhancement doctrine." This misconception is immediately apparent from appellees' own heading of the argument on this point: "The organic relationship of appellants' rolling stock habitually found in Missouri contributes to the value of the Norfolk & Western system." (Br. 13). This stands the doctrine on its head, for the doctrine is based on the premise that intangible system values contribute to the value of the rolling stock habitually found within the taxing state.

Appellees point to three cases cited by appellants—*Pullman Co. v. Richardson*, 261 U.S. 330 (1923), *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897) and *Cleveland, C.C. & St. L. Ry. v. Backus*, 154 U.S. 439 (1894)—in which this Court approved the application of a mileage formula to reach enhanced value. Appellees then contend that "there is nothing to distinguish the Missouri law from the cases cited by appellants." (Br. 14). But the difference between the three cited cases and the present case is readily summarized and crucially important—the tax base in those cases was designed to include intangible property.

In *Richardson*, California applied a tax upon the company's property measured by the revenue it generated, thus attempting to reach going concern value, as reflected in gross receipts,⁶ and it used a mileage formula to determine what part of those gross receipts could be allocated to California. This is quite unlike Missouri's statute, under which the value of tangible property is measured by its cost less depreciation.

⁶ Compare *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959).

In *Adams Express* and in *Backus*, a mileage proportion was applied to the total value of an express company and of a railroad to determine the property tax on all of the taxpayer's property within the taxing state, not just its express wagons or its rolling stock. Indeed, in *Adams Express* this Court, in discussing prior decisions in which organic values had been considered, made quite clear the distinction between those decisions and *Adams Express*, on the one hand, and the present case, on the other hand:

"The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation." 165 U.S. at 220-21.

And this Court pointed out that the statute in *Backus* did reach all the railroad's property within the state. *Pittsburgh C.C. & St. L. Ry. v. Backus*, 154 U.S. 421, 429-30 (1894). Thus, in each of these cases, prior to the allocation to the taxing state the state tax agency had before it a value for the taxpayer that was meant to include the worth of intangible as well as tangible property.

In the instant case, however, the Missouri Tax Commission did not make any allowance for intangible value of the entire Norfolk & Western system before allocating a part of the value of the carrier's rolling stock to Missouri by way of the mileage formula. Thus, as we urged previously in our brief (Appellants' Brief

34, 38-39), there was no stage at which the Missouri Tax Commission could take into account the intangibles of the Norfolk & Western, if such intangibles did indeed exist. The rhetoric of the court below and of the appellées here, therefore, as to the overassessment of appellants' rolling stock being due to its enhanced value is merely an after-the-fact rationalization for the application of the Missouri tax formula in a situation that does not fit the basic premise of that formula—a substantially even division of the railroad's rolling stock throughout the railroad's entire system. *St. Louis Southwestern Ry. v. State Tax Comm'n*, 319 S.W.2d 559, 562 (Mo. 1959).

Adams Express and *Backus* are distinguishable on another important ground. In each of those cases the statute contemplated that all railroads or express companies would be taxed upon their whole values, including intangibles, and therefore would probably pay a tax on a property assessment that was greater than the value of the tangible property, considered separately, within the taxing state. In the instant case, on the other hand, the Norfolk & Western is said to be liable to taxation on its intangibles merely because it does not fit the premise of the statute. Thus, unlike those railroads whose rolling stock is evenly divided throughout the system or those that have a high traffic density in Missouri, only the Norfolk & Western and other railroads with light traffic density in Missouri are subject to a tax on their intangibles. Appellees have cited no cases approving this discriminatory application of the enhancement doctrine, and appellants submit that no such cases exist.

IV. The potential double taxation arising out of the Missouri overassessment is inconsistent with the Commerce clause.

Finally, the appellees argue that "the taxation of property which is within the jurisdiction of the state, at least during a portion of the taxing period, is not rendered objectionable as double taxation by the fact that the same property is, or may be, also assessed for taxation in another state. *Northwest Airlines v. State of Minnesota*, 322 U.S. 292 (1944)." (Br. 18). This is a remarkable statement, supported neither by the *Northwest Airlines* case nor any other decision of this Court, and it can only be explained by appellees' disregard of appellants' arguments under the Commerce clause.⁷ In *Northwest Airlines* itself, Mr. Justice Frankfurter, announcing the conclusion and judgment of the Court, went to great lengths to point out that this Court was not sanctioning double taxation:

"The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. It was not shown in the Miller Case [202 U.S. 584], and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere." 322 U.S. at 295-96.

⁷ Appellees also cite *Illinois Cent. R.R. v. Minnesota*, 300 U.S. 157. (1940), as sanctioning double taxation. The brief discussion of the point in that case, however, was directed only to whether the Due Process clause proscribed double taxation. See also *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942). Appellants' argument is not that the Due Process clause proscribes double taxation, but rather that it prevents taxation beyond a state's borders and that the Commerce clause prevents multiple taxation of businesses when it results from the character of their interstate operations. Other cases cited by appellees on this point hold only that the Due Process clause does not prohibit a state from taxing twice one aspect of the affairs of a single entity.

"The doctrine in the Miller Case, which we here apply, does not subject property permanently located outside of the domiciliary State to double taxation. But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere." 322 U.S. at 300.

This Court has consistently recognized that "multiple taxation of interstate operations" offends the Commerce clause. *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952); *Central R.R. v. Pennsylvania*, 370 U.S. 607, 612 (1962). Indeed, had this Court sanctioned double taxation, as appellees claim, the *Central Railroad* case, and others like it, would have been decided differently, for there would have been no reason to determine "the extent that [the railroad] could be taxed by another state," 370 U.S. at 614.

Moreover, the appellees' suggestion that a state can tax any property which is located within it during any "portion of the taxing period" (Br. 18), is hopelessly at odds with the guiding constitutional principle in this area: "Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem." *Braniff Airways v. Nebraska State Bd.*, 347 U.S. 590, 603 (1954) (Mr. Justice Douglas concurring)... Undoubtedly there are railroads that have nearly every piece of rolling stock within a number of states during some portion of the tax year. Under appellees' theory those railroads could be taxed at almost the full value of their rolling stock fleet by every such state. Were that so, the Commerce clause might as well be held inapplicable to all interstate carriers.

CONCLUSION

For the reasons stated in our opening brief and in this reply brief the judgment below should be reversed.

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JANUARY 1968



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 324

NORFOLK AND WESTERN RAILWAY COMPANY and
WABASH RAILROAD COMPANY,
Appellants,

vs.

MISSOURI STATE TAX COMMISSION; Hunter Phillips;
Howard J. Love; J. Ralph Hutchison, Members of the
Missouri State Tax Commission, and J. R. Towson,
Secretary of the Missouri State Tax Commission,
Appellees.

On Appeal from the Supreme Court of Missouri.

APPELLEES' PETITION FOR REHEARING.

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APPELLEES' PETITION FOR REHEARING.

QUESTIONS PRESENTED FOR REVIEW.

In the Court's majority opinion a requirement inconsistent with the cases cited has now been placed upon the findings and assessment by a taxing authority.

In addition, appellants sought and gained the attention of the court by wig-wagging a red herring in the form of a prior unrelated tax assessment. The assessment to which we refer is the 1964 assessment levied against the Wabash Railroad Company before it became an integral part of the vastly larger Norfolk & Western Railway Company. In urging the

Court to measure the challenged assessment against the prior assessment, appellants advocated overruling the principal announced in **Pittsburgh, C.C. & St. L. Ry. v. Backus**, 154 U.S. 421 (1894), to the effect that an increase in assessment does not prove error in the increased assessment, 154 U.S. 432.

Appellees strongly argued in their Brief that the assessment contained an element of enhanced value. The Court in its opinion agreed that there might be enhanced value (O. 11)* but there was no evidence of the amount of such value. This is true; there is no evidence of record relating to amount. The burden is clearly on the taxpayer to present evidence and the record is barren of such evidence.

The questions presented are these:

1. In holding that the challenged assessment cannot be sustained by enhanced value, this Court has reversed the burden of proof long established by case law and overruled **Butler Bros. v. McColgan**, 315 U.S. 501 (1942); the cases cited therein and the cases subsequently relying thereon.
2. By not recognizing the presumption that the assessment is constitutionally valid, the Court has presented a conflict with the line of cases represented by **Green v. Frazier**, 253 U.S. 233 (1920), and **Walters v. City of St. Louis, Mo.** 347 U.S. 231 (1954).

*Citations to the portions of the record that are reprinted in the Appendix are cited (A. 1, et seq.); references to appellants' Brief are designated (B. 1, et seq.); references to the Court's Opinion are cited (O. 1, et seq.).

ARGUMENT.**I.**

In holding that the challenged assessment cannot be sustained by enhanced value, this court has reversed the burden of proof long established by case law and overruled **Butler Bros. v. McColgan**, 315 U.S. 501 (1942), the cases cited therein and the cases subsequently relying thereon.

Prior to the opinion in the subject case, the taxpayer clearly had the burden when challenging the constitutionality of a tax assessment. **Norfolk & Western Ry. v. North Carolina, ex rel. Maxwell**, 297 U.S. 682, 685 (1936). "One who attacks a formula of apportionment carries a distinct burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed." **Butler Bros. v. McColgan**, 315 U.S. 501, 507 (1942).

In holding that the assessment was so grossly excessive as to be unconstitutional, the Court did so without being presented with any evidence of record, or otherwise, regarding enhanced value. The Court in its opinion discussed the holding below regarding enhanced value and said the Missouri Supreme Court had concluded that the lease transfer had increased the value of the assets of the two separate lines and then stated in part as follows:

"*** This may be true, but it does not follow that the Constitution permits us, without evidence as to the amount of enhancement that may be assumed, to bridge the chasm between the formula and the facts of record. The difference between the assessed value and the actual value as shown by the evidence to which we have referred is too great to be explained by the mere assertion, without more, that it is due to an assumed and non-particularized increase in intangible value. See **Wallace v. Hines**, 253 U.S. 66, 69 (1920)." (O. 11).

Under the doctrine of **Butler Bros. v. McColgan**, appellants have the burden and it is strict. But where is there a scintilla of evidence presented by appellants at any level of this proceeding either proving up what enhanced value should be or what it should not be? The answer, we feel, is clear—there is no evidence. The Court, of course, recognized the absence of evidence in its opinion, stating:

"*** The basic difficulty here is that the record is totally barren of any evidence relating to enhancement or to going-concern or intangible value, or to any other factor which might offset the devastating effect of the demonstrated discrepancy. ***" (O. 10)

It should be further noted that the appellants were quite aware of the form and content of tax assessments as evidenced by their extensive use of a prior unrelated and irrelevant assessment. Appellees are referring to the unchallenged 1964 assessment levied upon Wabash Railroad Company which was used extensively by appellants as a red-herring against which they argued that the challenged assessment be measured. Since appellants had knowledge of the general form and substance of the Tax Commission findings, they could have, and should have, asked for a separate finding on enhanced value or at least presented evidence, a task that they singularly avoided. Not only did appellants fail to produce any evidence for or against enhanced value, but they studiously denied that **Section 151.060 (3), RSMo 1959**, was designed to get at enhanced value (B. 30, et seq.).

That a later assessment is larger than a prior assessment is no proof of the invalidity of the later assessment. **Pittsburgh, C.C. & St. L. Ry. v. Backus**. 154 U.S. 421, 432 (1894). This is all the more true in the instant case since the later assessment involves a different and vastly larger railroad.

It can be fairly concluded that not only have the appellants failed to present "clear and cogent evidence" opposing enhanced value, they have failed to present any evidence at all.

The record is replete with evidence showing the size of Norfolk & Western Railway compared to the size of Wabash Railroad at the time of the 1964 assessment. It can hardly be debated that an increase in enhanced value had inherently occurred as a result of the lease transfer and subsequent sale. The court agreed that this could be true, and yet seems to presume that the assessment is unconstitutionally excessive. Such a presumption appears to be in direct discord with the presumption that such acts are constitutional, which is further discussed in Point II.

In the absence of any proof in opposition to the issue of enhanced value, appellants cannot meet the strict burden of "clear and convincing evidence".

II.

By not recognizing the presumption that the assessment is constitutionally valid, the court has presented a conflict with the line of cases represented by *Green v. Frazier*, 253 U.S. 233 (1920), and *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954).

The Missouri State Tax Commission is entitled to the presumption that the assessment is valid and the presumption operates as to any part of the assessment including the enhanced value element.

"When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial

interference. . . ." **Green v. Frazier**, 253 U.S. 233, 239 (1920); **Walters v. City of St. Louis, Mo.**, 347 U.S. 231, 237. (1959).

While the **Green** case involved the construction of a tax statute, as did the **Walters** case, the presumption rule quoted is applicable to the subject case. Yet, the Court's opinion seems to be in conflict with **Green v. Frazier** and **Walters v. City of St. Louis, Mo.**, because the Court did not recognize and sustain the Missouri Supreme Court's holding (A. 85, 86) in which the presumption was allowed.

Appellants' evidence all goes to the depreciated equalized allocation by the mileage formula of rolling stock to the exclusion of any evidence regarding enhanced value. This is clearly demonstrated by the fact that appellants even vigorously denied that enhanced value was applicable under the Missouri statute involved, (B. 30, et seq.), a position which this Court obviously did not approve (O. 11). If the presumption is indulged the only possible result is to sustain the holding of the court below. To vacate and remand this subject case in light of the permissible presumptions presents a clear conflict in the line of cases represented by **Green v. Frazier**, supra, and **Walters v. City of St. Louis, Mo.**, supra.

CONCLUSION.

The conflict occasioned by this opinion with the cases previously decided by the Court has unsettled the long-established law in a very sensitive area of taxation. This particular matter involving ad valorem taxing of railroad rolling stock is crucial to the State of Missouri, as well as practically every state of the Union. If the burden of the taxpayer has now been changed and the well-established presumptions are no longer applicable, then the Court's holding should be made abundantly clear.

If appellees have misconstrued the Court's opinion and the cases previously discussed have not been disturbed, then appellants must fail in their attack upon the challenged assessment.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH.

This Petition For Rehearing is presented in good faith
and is not presented for delay.

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SUPREME COURT OF THE UNITED STATES

No. 324.—OCTOBER TERM, 1967.

Norfolk and Western Railway
Company et al., Appellants, } On Appeal From the
v. } Supreme Court of
Missouri State Tax } Missouri.
Commission et al.

[March 11, 1968.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case brings before us, once again, troublesome problems arising from state taxation of an interstate commercial enterprise. At issue is a tax assessment pursuant to a Missouri statute specifying the manner in which railroad rolling stock is to be assessed for the State's *ad valorem* tax on that property.¹

In 1964 the Norfolk & Western Railway Co. (N & W), a Virginia corporation with interstate rail operations, leased all of the property of appellant Wabash Railroad Company. The Wabash owned substantial fixed property and rolling stock, and did substantial business in Missouri as well as in other States. Prior to the lease, N & W owned no fixed property and only a minimal amount of rolling stock in Missouri. N & W is primarily a coal-carrying railroad. Much of its equipment and all of its specialized coal-carrying equipment are generally located in the coal regions of Virginia, West Virginia, and Kentucky, and along the coal-ferrying routes from those regions to the eastern seaboard and the Great Lakes. Scarcely any of the specialized equipment ever

¹ The tax in question applies to "all real property . . . [and] tangible personal property . . . owned, hired or leased by any railroad company . . . in this state." Intangible personal property is explicitly exempted from this tax. Mo. V. A. S. § 151-010.

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enters Missouri. According to appellants, the Wabash property in Missouri was leased by N & W in order to diversify its business, not to provide the opportunity for an integrated through movement of traffic.

By the terms of the lease, the N & W became obligated to pay the 1965 taxes on the property of the Wabash in Missouri and elsewhere.² Upon receiving notice of the 1965 assessment from the appellee Missouri Tax Commission, the N & W filed a request for an adjustment and hearing before the Commission. The hearing was held, and the Commission sustained its assessment against the taxpayer's challenge. On judicial review, the Commission's decision was affirmed without opinion by the Circuit Court of Cole County, and then by the Supreme Court of Missouri. Appellants filed an appeal in this Court, contending that the assessment in effect reached property not located in Missouri and thus violated the Due Process Clause and the Interstate Commerce Clause of the United States Constitution. We noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The Missouri property taxable to the N & W was assessed by the State Tax Commission at \$31,298,939. Of this sum, \$12,177,597 relates to fixed property within the State, an assessment that is not challenged by appellants. Their attack is aimed only at that portion of the assessment relating to rolling stock, \$19,981,757.³

² As of January 1, 1966, the N & W purchased the Wabash rolling stock that it had previously leased, while continuing to lease Wabash fixed property. This change in the relationship between N & W and the Wabash has no effect on the issues presented to us. Our analysis would apply both before and after the purchase of the Wabash rolling stock.

³ The Commission deducted from the sum of these two figures \$860,415, representing an "economic factor" which is allowed to all railroads in varying amounts. Exactly the same deduction had been allowed the Wabash in each of the three preceding years.

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With respect to the assessment of rolling stock, the Commission used the familiar mileage formula authorized by the Missouri statute. In relevant part, this provides (§ 151.060 (3)):

"... when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

The Commission arrived at the assessment of rolling stock by first determining the value of all rolling stock, regardless of where located, owned or leased by the N & W as of the tax day, January 1, 1965. Value was ascertained by totaling the original cost, less accrued depreciation at 5% a year up to 75% of cost, of each locomotive, car, and other piece of mobile equipment. To the total value, \$513,309,877, was applied an "equalizing factor" of 47%, employed in assessing all railroad property in an attempt to bring such assessments down to the level of other property assessments in Missouri. The Commission next found that 8.2824% of all the main and branch line road (excluding secondary and side tracks) owned, leased, or controlled by the N & W was situated in Missouri. This percentage was applied to the equalized value of all N & W rolling stock, and the resulting figure was \$19,981,757.

There is no suggestion in this case that the Commission failed to follow the literal command of the statute. The problem arises because of appellants' contention that, in mechanically applying the statutory formula, the Commission here arrived at an unconscionable and unconstitutional result. It is their submission that the

assessment was so far out of line with the actual facts of record with respect to the value of taxable rolling stock in the State as to amount to an unconstitutional attempt to exercise state taxing power on out-of-state property.

Appellants submitted evidence based upon an inventory of all N & W rolling stock that was actually in Missouri on tax day. The equalized value of this rolling stock, calculated on the same cost-less-depreciation basis employed by the Commission, was approximately \$7,600,000, as compared with the assessed value of \$19,981,000. Appellants also submitted evidence to show that the tax-day inventory was not unusual. The evidence showed that, both before and in the months immediately after the Wabash lease, the equalized value of the N & W rolling stock actually in Missouri never ranged far above the \$7,600,000 figure. In the preceding year, 1964, the rolling stock assessment against the Wabash was only \$9,177,683, and appellants demonstrated that neither the amount of rolling stock in Missouri nor the Missouri operations of the N & W and Wabash had materially increased in the intervening period.* The assessment of the fixed properties (for which no mileage formula was applied) hardly increased between 1964 and 1965. In 1964, prior to the lease, the fixed properties in Missouri were assessed at \$12,092,594; in 1965, after the lease, the assessment was \$12,177,597.

The Supreme Court of Missouri concluded that the result reached by the Commission was justifiable. It pointed out that the statutory method used by the Commission proceeds on the assumption that "rolling stock

* Appellants further argue that the arbitrariness of the result reached here is shown by the fact that if the rolling stock in Missouri had been taxable to the Wabash in 1965, rather than to N & W, the application of the formula to the same rolling stock would have resulted in an assessment of little more than half of that which was actually levied (\$10,103,340).

is substantially evenly divided throughout the railroad's system, and the percentage of all units which are located in Missouri at any given time, or for any given period of time, will be substantially the same as the percentage of all the miles of road of the railroad located in Missouri." It then held that the valuation found by the Commission could be justified on the theory of "enhancement," although the Commission had not referred to that principle. The Court described the theory as follows:

"The theory underlying such method of assessment is that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole and may, therefore, be taxed according to its value as part of the system, although the other parts be outside the state;—in other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the system. *Pullman Co. v. Richardson*, 261 U. S. 330, 338."

The court correctly noted, however, that "even if the validity of such methods be conceded, the results, to be valid, must be free of excessiveness and discrimination." It concluded that in the present case, the result reached by the Commission was justifiable. We disagree. In our opinion, the assessment violates the Due Process and Commerce Clauses of the Constitution.

II.

Established principles are not lacking in this much discussed area of the law. It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. *Marye v. Baltimore & Ohio R. Co.*, 127 U. S. 117, 123-124 (1888); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18

(1891); *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 155 (1949); *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590 (1954). That fair share may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State, including a portion of the intangible, or "going-concern," value of the enterprise. *Railway Express Agency v. Virginia*, 347 U. S. 359, 364 (1954); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 455 (1918); *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 218-225 (1897). The value may be ascertained by reference to the total system of which the intrastate assets are a part. As the Court has stated the rule, "the tax may be made to cover the enhanced value which comes to the [tangible] property in the state through its organic relation to the [interstate] system." *Pullman Co. v. Richardson*, 261 U. S. 330, 338 (1923). Going-concern value, of course, is an elusive concept not susceptible of exact measurement: *Rowley v. Chicago & N. W. R. Co.*, 293 U. S. 102, 109 (1934); *Nashville, Chattanooga & St. Louis R. Co. v. Browning*, 310 U. S. 362, 365-366 (1940). As a consequence, the States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders. *Union Tank Line Co. v. Wright*, 249 U. S. 275, 282 (1919). Such formulas usually involve a determination of the percentage of the taxpayer's tangible assets situated in the taxing State and the application of this percentage to a figure representing the total going-concern value of the enterprise. See, e. g., *Rowley v. Chicago & N. W. R. Co.*, 293 U. S. 102 (1934); *Pittsburgh, Cincinnati, Chicago and St. Louis R. Co. v. Backus*, 154 U. S. 421 (1894). A number of such formulas have been sustained by the Court, even though it could not be demonstrated that the results

they yielded were precise evaluations of assets located within the taxing State. See, e. g., *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362, 365-366 (1940).

On the other hand, the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State. *The Delaware R. Tax*, 18 Wall. 206, 229 (1873); *Fargo v. Hart*, 193 U. S. 490, 499 (1904). In some cases the Court has concluded that States have, in fact, cast their tax burden upon property located beyond their borders. *Fargo v. Hart*, 193 U. S. 490, 499-503 (1904); *Union Tank Line Co. v. Wright*, 249 U. S. 275, 283-286 (1919); *Wallace v. Hines*, 253 U. S. 66, 69-70 (1920); *Southern R. Co. v. Kentucky*, 274 U. S. 76, 81-84 (1927). The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due.⁵ A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders." *Nashville, Chattanooga & St. Louis R. Co. v. Browning*, 310 U. S.

⁵ We have said: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various States in which it functions.' *Nashville, Chattanooga & St. Louis R. Co. v. Browning*, 310 U. S. 362, 365. So far as due process is concerned, the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Ott v. Mississippi Barge Line*, 336 U. S. 169, 174 (1949). Neither appellants nor appellee contend that these two analyses bear different implications insofar as our present case is concerned.

362, 365 (1940). Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. *Fargo v. Hart*, 193 U. S. 490, 499-500 (1904).⁶

III.

Applying these principles to the facts of the case now before us, we conclude that Missouri's assessment of N & W's rolling stock cannot be sustained. This Court has, in various contexts, permitted mileage formulas as a basis for taxation. See, e. g., *Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Backus*, 154 U. S. 421 (1894). A railroad challenging the result reached by the application of such a formula has a heavy burden. See *Butler Brothers v. McColgan*, 315 U. S. 501, 507 (1942); *Norfolk & Western R. Co. v. North Carolina*, 297 U. S. 682, 688 (1936). It is confronted by the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints. Its task is to show that application of the mileage method in its case has resulted in such gross overreaching, beyond the values represented by the intrastate assets purported to be taxed, as to violate the Due Process and Commerce Clauses of the Constitution. Cf. *Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 547 (1950). But here the

⁶ As the Court stated in *Wallace v. Hines*, 253 U. S., at 69: "The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not . . . to open to taxation what is not within the state. Therefore, no property of . . . an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state."

appellants have borne that burden, and the State has made no effort to offset the convincing case that they have made.

Here, the record shows that rigid application of the mileage formula led to a grossly distorted result. The rolling stock in Missouri was assessed to N & W at \$19,981,757. It was practically the same property that had been assessed the preceding year at \$9,177,683 to the Wabash. Appellants introduced evidence of the results of an actual count of the rolling stock in Missouri. On the basis of this actual count, the equalized assessment would have been less than half of the value assessed by the state commission. The commission's mileage formula resulted in postulating that N & W's rolling stock in Missouri constituted 8.2824% of its rolling stock. But appellants showed that the rolling stock usually employed in the State comprised only about 2.71% by number of units (and only 3.16% by cost-less-depreciation value) of the total N & W fleet.

Our decisions recognize the practical difficulties involved and do not require any close correspondence between the result of computations using the mileage formula and the value of property actually located in the State, but our cases certainly forbid an unexplained discrepancy as gross as that in this case.⁷ Such discrepancy certainly means that the impact of the state tax is not confined to intrastate property even within the broad tolerance permitted. The facts of life do not neatly lend themselves to the niceties of constitutionalism;

⁷ "If the ratio of the value of the property in [the State] to the value of the whole property of the company be less than that which the length of the road in [the State] bears to its entire length, . . . a tax imposed upon the property in [the State] according to the ratio of the length of the whole road must necessarily fall upon property out of the State." *The Delaware Railroad Tax*, 18 Wall. 206, 230-231 (1873).

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but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product.

The basic difficulty here is that the record is totally barren of any evidence relating to enhancement or to going-concern or intangible value, or to any other factor which might offset the devastating effect of the demonstrated discrepancy. The Missouri Supreme Court attempted to justify the result by verbal reference to "enhanced" value, but the Missouri Commission made no effort to show such value or to measure the extent to which it might be attributed to the rolling stock in the State. In fact, N & W showed that it is chiefly a coal-carrying railroad, 70% of whose 1964 revenue was derived from coal traffic. It demonstrated that its coal operations require a great deal of specialized equipment, scarcely any of which ever enters Missouri. It showed that traffic density on its Missouri tracks was only 54% of traffic density on the N & W system as a whole. Finally, it proved that the overwhelming majority of its rolling stock regularly present in Missouri was rolling stock it had leased from the Wabash. As long ago as *Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Backus*, 154 U. S. 421 (1894), we indicated that an otherwise valid mileage formula might not be validly applied to ascertain value of tangible assets within the taxing State in exceptional situations, for example, "where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock." *Id.*, at 431.

The Missouri Supreme Court did not challenge the factual data submitted by the N & W. Its decision that this data did not place this case within the realm of "exceptional situations" recognized by this Court was

apparently based on the conclusion that the lease transaction between Wabash and the N & W had increased the value of tangible assets formerly belonging to the two separate lines. This may be true, but it does not follow that the Constitution permits us, without evidence as to the amount of enhancement that may be assumed, to bridge the chasm between the formula and the facts of record. The difference between the assessed value and the actual value as shown by the evidence to which we have referred is too great to be explained by the mere assertion, without more, that it is due to an assumed and nonparticularized increase in intangible value. See *Wallace v. Hines*, 253 U. S. 66, 69 (1920).

As the Court recognized in *Fargo v. Hart*, 193 U. S. 490, 499 (1904), care must be exercised lest the mileage formula

"be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or goodwill, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense."

We repeat that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the State is obliged to counter that

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evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail.

IV.

Accordingly, we conclude that, on the present record, Missouri has in this case exceeded the limits of her constitutional power to tax, as defined by the Due Process and Commerce Clauses. It will be open to the Missouri Supreme Court, so far as our action today is concerned, to remand the case to the appropriate tribunal to reopen the record for additional evidence to support the assessment. We vacate the judgment of the Supreme Court of Missouri and remand the cause to it for further proceedings not inconsistent with our decision.

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 324.—OCTOBER TERM, 1967.

Norfolk and Western Railway
Company et al., Appellants, } On Appeal From the
v. Supreme Court of
Missouri State Tax Missouri.
Commission et al.

[March 11, 1968.]

MR. JUSTICE BLACK, dissenting.

It is established law, as the Court apparently recognizes in its opinion, that an interstate company challenging a state apportionment of the company's property taxable in the State has the heavy burden of proving by "clear and cogent proof" that the apportionment is grossly and flagrantly excessive. See, e. g., *Railway Express Co. v. Virginia*, 358 U. S. 434, 444, and cases cited. I agree with the Supreme Court of Missouri that the railroad here failed to meet that burden and would therefore affirm its judgment. See its opinion at — Mo. App. —.

It is true that most of the cars used in Missouri by N & W were owned by the Wabash Railroad and that before transfer to N & W they had been assessed at \$9,179,688 as against the assessment here of \$19,981,000. But this, of course, does not prove that the higher assessment was too much. For as the Supreme Court of Missouri pointed out, this Court has held that "a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive . . ." *Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Backus*, 154 U. S. 421, 432. The court below held, and this Court agrees, that in pricing the

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value of the rolling stock the Commission was authorized to consider intangible values, such as goodwill and values added because of the enhancement to the property in Missouri brought about by being merged into the entire N & W system. This consideration of enhanced value is not new (see, e. g., *Pullman Co. v. Richardson*, 261 U. S. 330, 338), and, as the Court points out, it is because of this intangible factor of enhancement that States are allowed wide discretion in determining the value of tangible property located within their borders. Thus, mileage formulas, such as the one used here, have generally been upheld. As this Court said in *Nashville, C. & St. Louis R. Co. v. Browning*, 310 U. S. 362, "In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula [cases cited]." 310 U. S., at 365. It has never been contended that mileage formulas are completely accurate, but because States must consider such intangibles as enhancement value, these formulas are allowed except where the taxpayer can show, as the Court puts it, "that application of the mileage method in its case has resulted in such gross overreaching beyond the values represented by the intrastate assets purported to be taxed, as to violate the Due Process and Commerce Clauses of the Constitution." I do not believe that appellant has made such a showing here. The fatal flaw with the appellant's case is that it has not proved that the tax is excessive when possible enhancement of value due to the merger is considered. The Court's opinion admits as much when it says that "the record is totally barren of any evidence relating to enhancement or going-concern or intangible value, or to any other factor . . ." Where I differ with the Court is that I believe the burden of proof is on the railroad to show that the tax is excessive under all considerations rather than on the

Commission to show sufficient enhancement of value to justify the tax.

This Court has recognized before, and indeed the majority pays lip-service to the fact today, that it is impossible for a State to develop tax statutes with mathematical perfection. Indeed, as was stated in *International Harvester Co. v. Evatt*, 329 U. S. 416: "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, the Court has not been willing to nullify honest state efforts to make apportionments." 329 U. S., at 422-423. And the "burden is on the taxpayer to make oppression manifest by clear and cogent evidence." *Norfolk & Western R. Co. v. North Carolina*, 297 U. S. 682, 688. Since appellant here did not prove that the *enhanced value** of its rolling stock was less than the tax assessment, or that the State was imposing on it taxes that were exorbitant on the full value of all its property, cf. *Capital Greyhound Lines v. Brice*, 339 U. S. 542, I would affirm the decision of the Missouri Supreme Court.

*This is a familiar principle of valuation in such tax cases. See *Fargo v. Hart*, 193 U. S. 490, 499; *Galveston, Harrisburg & San Antonio R. Co. v. Texas*, 210 U. S. 217, 225; *United States Express Co. v. Minnesota*, 223 U. S. 335, 337; *Union Tank Line Co. v. Wright*, 249 U. S. 275, 282.